

**PROPERTY RIGHTS REGIME IN LAND DEVELOPMENT -
ANALYSIS OF THE INFLUENCE OF INSTITUTIONS ON LAND
DEVELOPMENT IN TERMS OF PROPERTY RIGHTS THEORY**

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PROPERTY RIGHTS REGIME IN LAND DEVELOPMENT - ANALYSIS OF THE INFLUENCE OF INSTITUTIONS ON LAND DEVELOPMENT IN TERMS OF PROPERTY RIGHTS THEORY

Małgorzata Barbara Havel

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<p>Abstract</p> <p>In the current institutional models, land development is primarily viewed as a process of social interaction in which informal institutional structures, strategies and personal characteristics of agents are influential. The institutional-economic models of land development emphasise the roles of uncertainty, incomplete information or transaction costs. Just recently, attention started to be paid to the formal ‘rules of the game’ and the property rights regime in land development processes. The purpose of this study is to increase knowledge on the role of the property rights regime in land development and contribute to the further conceptualisation of the impact of the institutions on land development. This study addresses the question of what constitutes the elements of the property rights regime in land development and how the differences in the property rights regime can explain differences in the land development processes.</p> <p>In order to achieve the aim of this study, the analytical model of land development based on the property rights approach is proposed and a comparative analysis on the influence of the property rights regime on land development methods in two countries is conducted. The research approach in this study is a mixture of some key characteristics of qualitative and comparative approaches.</p> <p>In the analytical model developed in this study, the distribution of ‘rights’ in the property rights regime in land development is the central concept. Within the property rights regime the explanatory variables were identified, which are important characteristics of the property rights regimes. The explanatory variables are: the position of the municipality in the development process, the flexibility versus certainty in development control, and the economic right in land development. The delineation and allocation of rights in connection to the explanatory variables were investigated in comparative research in two countries. Furthermore, the distribution of rights within the property rights regime was discussed in relation to the methods of land development. The empirical research shows how institutions affect the market processes.</p>		
Keywords: land development, property rights regime, property rights theory		

The power of a theory is exactly proportional to the diversity of situations it can explain. All theories, however, have limits. Models of a theory are limited still further because many parameters must be fixed in a model, rather than allowed to vary. Confusing a model – such as that of a perfectly competitive market – with the theory of which it is one representation can limit applicability still further. Scientific knowledge is as much an understanding of the diversity of situations for which a theory or its models are relevant as an understanding of its limits.

Elinor Ostrom (1990, p.24)

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INTRODUCTION

Background

This study investigates the process of land development in cities. Land development refers to the activity of preparation of land for further development and finally conversion of the area from one use into another, usually of greater intensity. Healey (1992), for example, defines the land and property development process as:

“...the transformation of the physical form, bundle of rights, and material and symbolic value of land and buildings from one state to another, through the effort of agents with interest and purposes in acquiring and using resources, operating rules and applying and developing ideas and values”.

In some cases, land development can be clearly distinguished from the property (building) development, which contains the construction of buildings on an already serviced plot. There can be a different set of actors involved in the land and property development processes. The land and property development can also be integrated into one process, where land servicing and construction of building are the responsibility of one intermediary developer¹. The land development processes in cities in two countries Poland and Finland, will be the subject of consideration in this research.

This study is underlined by two different sets of observations which constitute the motivation for writing this thesis. The first set of observations concern efficiency problems in the process of land development, the second set of observations relates to the institutional turn in urban and property market studies. Observations made in Poland were the starting point and an inspiration for my research. The final conclusion in this research will be made for Poland.

In the past sixty years, the institutional environment in which the land development is taking place in Poland, has experienced two profound changes. First, it was the transition to a socialist command style economy after World War II. Second, Poland experienced a transition back to market economy in the years following 1989. Market transitions, not surprisingly, stimulated changes in the functioning of the land and property market and in the land development processes. Since a transformation process is a journey ongoing via the ‘trial and error’ method, errors appeared also in the Polish land markets, especially in cities. One of the most visible problems was unsatisfactory spatial transformation of urban landscape. Spatial transformation refers to the spatial structure (pattern) of activities in a city including the quality of urban infrastructure. In the language of economics this could be called an efficiency problem with respect to the use and allocation of land resources. The dissatisfaction with the spatial results of the urban development processes in Poland is constantly growing. Discussions about the problems of the land development of Polish cities are ongoing for example in a forum of the journal *Urbanista* (Urban Planner). Recently journalists of daily newspapers have also started to criticize the state of the urban landscape in Poland making the inhabitants also aware of the situation. The very often mentioned problems refer e.g. to the

¹ See also textbooks of real estate development, e.g. Dewberry, 1996; Cadman & Topping, 2001; Miles *et al.*, 2000; Ratcliffe *et al.* 2004; DiPasquale & Wheaton, 1996

haphazard developments in the cities, urban sprawl, especially developments around the existing road systems, the public space problems, the gated communities, and, in general the inadequate provision of urban infrastructure, including both the primary and secondary infrastructure (Jędraszko, 2005 p.6, p.360; Izdebski *et al.*, 2007, Report of the Polish Ministry of Infrastructure of 2007). All these problems lead to a fragmented urban image of Polish cities.

However, the problematic situation, in which the market does not efficiently allocate goods and services, is present also in the mature markets. The land and property markets often fail because of their specific features and do not efficiently allocate goods and services in order to serve the perceived public interest. The allocation of land is normally not optimal to all parties involved. The supply is not able to meet demand even when the market price exceeds the production costs. For example, in Finland², one of the least densely populated countries in the world, there is a plenty of land but in spite of that there seems to be a shortage of land for housing development. Therefore, the allocation of land is also questionable. The failure to supply a sufficient amount of building land impedes the smooth functioning of the real estate market in most cities. The price elasticity of supply as an indicator of quantity of supply is relatively low indicating the relatively inelastic supply of land in Finland. The Finnish municipalities have been criticized that they are unable to carry out their land policy, and that has led to a shortage of building sites and increased land and house prices. The problem of building land also found its expression in the Finnish government's six measures program, which aimed to increase the amount of building land available and moderate the prices for building land. The tools for reaching these goals were the government interventions into the land market in the form of imposed restrictions and incentives. (Government Proposition for the State Budget 2006)

The above-mentioned problems related to the delivery of building land are just examples³. The list of socially unwanted aspects of the real estate development processes could be much further extended. Such limitations are present in all market economies. According to the approach of neo-classical economics, the situation when the market does not perfectly allocate resources is called market failure. The intervention in market processes in the forms of different restrictions or incentives is justified. In neo-classical economics, basically no attention is paid to the market processes and to the institutional environment within which the market is functioning. In the studies which follow the institutional approach (e.g.: Ball 1986, Healey and Barret 1990, Healey 1992, 1993 a,b, Van der Krabben, 1995) it is argued that we need to pay more attention to the institutions that structure the land market and land development process. Therefore, an institutional theory is needed. Nowadays, most researchers agree that 'institutions matter' and provide the 'missing link' that can explain the development outcome (Jütting, 2003). The institutional turn has emerged, e.g., in economics (Coase, 1960; North, 1990; Ostrom, 1990; Chang, 2006), planning theory (Healey 1997, 2007; Gualini, 2001; Lai, 2005) and property research (Healey, 1992; Van der Krabben, 1995; Guy & Henneberry, 2000; Kauko, 2002; Webster & Lai, 2003; Oxley, 2004; Needham, 2006; Buitelaar, 2007).

² I had moved to Finland and was living there at the time I started my research project

³ In Poland, also the insufficient allocation of new land for residential purposes is emphasised (Izdebski *et al.*, 2007, p.7)

In the field of property research, the institutional approach evolved based on criticism of traditional urban economic theories in the understanding of the built environment. The criticism and debate around traditional urban economic theories started a long time ago from the earliest critic of the von Thünen's model of land use and Alonso's bid-rent-distance relationship in urban location theory (Balchin *et al.*, 1993, p.18-22). It has been argued that the traditional urban economic theories are not able to explain the structure and processes of the built environment because of the idealized view of reality and the over-simplistic assumptions with respect to the external effects on market outcome (Haila 1990; Healey 1992; van der Krabben 1995; Kauko 2002, p.28-30)⁴.

The body of 'institutional' research has grown, although, as Buitelaar (2007, p.7) argues: "*it is still a very small stream compared to the vast majority of scholars that take a mainstream economic stance*". In addition, the methodological approaches in institutional studies in property research vary significantly (see for example Ball 1998).

Current institutional approaches to land development incorporate several factors as explanatory variables and tend to focus on the relationship between actors involved in the process (Geuting 2007). According to Geuting (2007, following Pryke and Lee, 1995 and Tiesdell and Allmendinger, 2005) in the present institutional models, for example, the models of Ball (1983; 1998), Healey (1992) and Keogh and D'Arcy (1999), the development process is viewed in the following way:

*"the development process is primarily viewed as a process of social interaction in which informal institutional structures and personal characteristics of agents are influential. In essence many of these institutional models are based on Giddens' concept of 'structuration' namely that they focus on the relations between structure and agency. (...) However, the formal 'rules of the game' (North, 1990, 7), or the property-rights regime, are mostly considered as a prior condition but not as a real policy tool."*⁵

Therefore, the studies concentrate, for example, on the strategies which guide the key stakeholders involved in urban development (for instance Edelman, 2007). The sole influence of formal rules of the game on the development outcome is not the subject of particular consideration.

The observations made in Poland were the inspiration for my research. The Polish system for planning and development started to be criticized by different authors who argue that the system suffers from numerous weaknesses due to incorrectly formulated regulatory framework (Jędraszko, 2005; Drzazga, 2006; Izdebski *et al.*, 2007). But what is the direction of changes needed within the system of rules in relation to planning and development? This is

⁴ Van der Krabben & Lambooy (1993) also stressed that urban economic theories are designed for the context of cities in Great Britain and the US. Therefore, it is problematic to use these theories to explain urban development that takes place in a different context, for example in the cities in the Netherlands. Following these lines of arguments, it is even much more difficult to apply the theories to the socialist cities, which extremely differ in terms of their spatial pattern (see for example Węclawowicz 1998, about the concept of the socialist cities).

⁵ The sociologist Anthony Giddens together with the philosopher Jürgen Habermas are two key thinkers whose work contributed to the development of the approach called sociological institutionalism. Giddens' theory of structuration assumes that the world is dominated by structural forces and by relations of power between structure and agency. (Healey, 1997, p.47)

still the open topic for discussion. This study will attempt to contribute to this discussion. In the literature, for example, the concept of a property rights regime was discussed in relation to regulatory framework in land development. A property rights regime in land development is defined as an integrated system of property rights connected to land that includes civil law, public law (e.g. planning law) and other types of law (like fiscal law and contract law) influencing the property market, (Geuting 2007).

Formal rules or regulatory framework define the distribution of property rights and duties between parties involved in the process. Property rights are significant instruments in society helping people to deal with each other and direct competition over scarce resources (Demsetz 1967). In the common understanding property rights constitute a typical example of an institution:

“Property rights are rules and therefore according to the usual definition, institutions.”
(Buitelaar & Needham 2007a)

According to e.g. Demsetz 1967, Fischel 1978, 1980, Bromley 1991, Barzel 1997, and Needham 2006 a property rights approach generates a better understanding of the allocation of resources. Libecap (1989, p.10) has noted that the nature in which property rights are defined and enforced fundamentally impacts the performance of an economy for at least two reasons:

- *“First, by assigning ownership to valuable resources and by designating who bears the economic rewards and costs of resource-use decisions, property rights institutions structure incentives for economic behaviour within the society.*
- *Second, by allocating decision-making authority, the prevailing property rights arrangement determines who the key actors are in the economic system.”*

The application of property rights theory to planning and development issues indicates the significance of the allocation of rights and responsibilities in the regulatory framework of the process of land development. The different formal rules in relation to land specify who may benefit or may be harmed, and, therefore, to whom belongs the economic right in land development. The recognition of this easily leads to close relationship between property rights and externalities and other efficiency problems in the process of the provision of land. The property rights regime (the way the property rights are delimited and allocated in land development process) can relate to all market failures (like externality and public goods and other efficiency problems) in the provision of land. Therefore, the delineation and allocation of rights within the property rights regime, as a part of the institutional environment of the process of the production of space, ultimately determines the process and its outcome and deserves attention while building the new spatial planning system, as it is in Poland.

Property rights regime in land development is constituted by a complex system of rules. There is no such thing as a common planning system for the European countries (CEC 1997), and there is no universal distribution of rights and duties within the property rights regime in land development. Distribution of rights within property rights regimes varies considerably in terms of the scope of rights of parties involved in the process. The spatial planning systems in the European countries vary in terms of maturity and completeness of systems, the distance between expressed objectives and outcomes, as well as the locus of power (centralisation

versus decentralisation), and the relative role of the public and private sector (plan-led versus market-led approach) (CEC 1997). However still, for the country which is building a totally new system and faces the different efficiency problems in the process of land development the comparative knowledge of the solutions adopted in other countries could be of crucial importance.

The aim and objectives of the study

The aim of this study is to increase knowledge about the role of the property rights regime in land development process and to contribute to the further conceptualisation of the impact of the institutions on land development.

In order to achieve the aim of the study, an analytical model to study land development based on the property rights approach will be proposed and a comparative analysis on the influence of the property rights regime on land development processes will be conducted. The research propositions are expressed in the form of the following scientific objectives:

1. To build an analytical model of the influence of the property rights regime on land development processes
2. To investigate the property rights regime and the land development in the countries concerned in the comparative research
3. To find out the various links running from the property rights regime to land development processes

In this study I address the question of what constitutes the elements of the property rights regime in land development and how the differences in the property rights regime can explain differences in land development processes.

Research approach and methodology

The research approach in this study is a mixture of some key characteristics of qualitative and comparative approaches. Qualitative research is based on the assumption that is very different from quantitative design. The qualitative research⁶ approach is exploratory and is useful when the researcher does not know the important variables to examine. Theory or hypotheses are not established a priori. In this research, the elements of the property rights regime and their relations to land development processes are not initially defined. (Creswell, 2003)

Comparative research aims to make comparisons across different countries or cultures. In this research two countries will be a subject of a comparative research. In comparative research countries are examined from various perspectives and comparative studies use concepts applicable in more than one country. Rose (1991) pointed out that *“without concept, information about different countries may be assembled together but we have no basis for relating one country to another”*. The presence or absence of concepts is the test of whether a study can be considered comparative. In this study a framework for analysis will be

⁶ More about qualitative research see, e.g.: Creswell (2003), Neuman (2000)

developed. In this way the study will have the concepts, which will be precisely defined for comparative research.

In relation to research approaches the four questions, which show the interrelated levels of decisions that go into the process of designing research, should be considered, as Crotty (1998) puts it:

1. *“What epistemology – theory of knowledge embedded in the theoretical perspective – informs the research (e.g. objectivism, subjectivism, etc.)?”*
2. *What theoretical perspective – philosophical stance – lies behind the methodology in question (e.g., positivism and postpositivism, interpretivism, critical theory, etc.)?*
3. *What methodology – strategy or plan of action that link methods to outcomes – govern our choice and use of methods (e.g. experimental research, survey research, ethnography, etc.)?*
4. *What methods – techniques and procedures – do we propose to use (e.g. questionnaire, interview, focus group, etc.)?”*

There are different ways to further discuss these elements⁷. According to Creswell (2003, p.5) these four questions can be conceptualised into three main problems: what knowledge claims are being made by the researcher (including a theoretical perspective), what strategies of inquiry will inform the procedures, and what methods of data collection and analysis will be used. Therefore there are three elements of research approach: knowledge claims, strategies and methods. There are different schools of thought and alternative knowledge claims⁸: e.g. positivism/postpositivism, constructivism, advocacy and pragmatism. The two most common paradigms are positivism versus constructivism. Positivism holds that scientific knowledge comes from positive affirmation of theories through strict scientific methods: quantitative research. According to constructivism people claim knowledge through an alternative process and set of assumptions. Meanings are constructed by human beings as they engage with the world they are interpreting. Constructivism believes that there are other methodologies for social science, like qualitative research (Creswell, 2003, p. 4 - 12). In this study the knowledge claim is more close to the constructivism epistemology than to positivist epistemology.

According to Creswell (2003, p.14) there are the following strategies associated with the qualitative approach: ethnographies, grounded theory, case studies, phenomenological research and narrative research. In this research the case study⁹ is the strategy which is followed. The focus of this study is on gaining deeper understanding on the subject under the study (the process of land development). Considering the various approaches to deal with the research questions, use of case study¹⁰ was the most promising choice. In a sense land

⁷ Neuman (2000) contrast three methodologies – positivist social science, interpretative social science, and critical social science – in terms of eight questions.

⁸ Knowledge claims are also called philosophical assumptions, ontologies (what is knowledge), and epistemologies (how we know it).

⁹ More about case study as a research strategy see, e.g.: Eisenhardt (1989), Yin (1994), Stake (1995). Yin (1994) has described the design of case study research. He has also defined case study as a research strategy.

¹⁰ In case study research the questions that are to be answered have an explanatory character of “how” and “why” (Why it is as it is?). The investigator has no control over events and the research problem represents the complex contemporary phenomenon both in social science and in applied science. (Yin 1994)

development processes (property rights regime for land development) can be seen as one case to be explored, yet in a different context. However, in another sense, cases in this research are two countries, which are the subject of consideration. According to Yin (1994) case studies can involve either single or multiple cases, and numerous levels of analysis. Case studies can also be comparative to a certain extent. In this research there are many aspects, which are going to be the subject of comparison in two countries, as it is also in the comparative research. Therefore there is a mixture of approaches, qualitative (case study) and comparative.

The two countries chosen in this study for detailed comparative analysis are Poland and Finland. To study more countries in relation to such a complex process as land development would require too much work in one study by one researcher. However, at the stage of limiting the scope of further comparison and building the theoretical model of land development process, the selective institutions and methods of land development were studied in an international context, in this case mainly a European context, referring to British, Dutch, Swedish and German research. The findings of this study were added to the theoretical framework of the thesis. Thereafter two countries were chosen for a more detailed analysis. The efficiency problems and the criticism of the regulatory framework in land development in Poland were the starting point and the inspiration for this research. The final conclusion in this study will be drawn for Poland. Finland represents an interesting contrast to the Polish system of planning and development, which is dominated by market forces. Nordic countries follow the line of a more plan-led development. In the comparative research concerning land development processes (for example Dransfeld & Voß, 1993; Davis *et al.*, 1990; Buitelaar, 2007) the comparison includes usually the UK against continental Europe. The research findings refer to the classical categorisation of Faludi (1973) concerning different approaches to planning. In this research the two new countries, which are not intensively studied in the literature, are added to the discussion. This kind of research choice can be referred to as a sort of comparison like the Netherlands and the UK, or in more general terms the overseas countries and the UK, because both countries in this research represent a different system of thinking about planning and development control. In this way a new knowledge of differences in land development can be added to the discussion. The selection of two specific different countries (Finland and Poland) allows maximising the variations in land development.

The third major element that defines the research approach is the specific method of data collection and analysis. The method of data analysis in this thesis is also qualitative. The empirical evidence collected in this study is mainly qualitative (e.g. words), however, the study also includes quantitative evidence (e.g. numbers). Methods of theoretical and empirical data collection include the systematic exploration of literature of land development process, planning theory and the theories appropriate to the subject of the research, legal sources and official statistics. The thesis is drawn upon a wide range of areas of discussion. In order to validate the empirical data obtained from written material, discussions with professionals (mainly lawyers and planners but also professionals involved in land and property development from both countries) will also be included.

In order to accomplish the aim of the study, the research process will be divided into two phases. Phase one aims to build an analytical model of the influence of the property rights regime on land development (the framework for comparative research). In phase two empirical data will be compared and discussed. The whole thesis is written in a way showing that research process.

In addition to the elements of the research approach discussed already, there are different logics of reasoning, which could be used in research¹¹. The research process of creating the framework for comparative research in this study can be related to the abductive logic. Application of abductive logic has been used in the corporate real estate management field of research (Lindholm, 2008; Miles & Huberman, 1994). Certain elements of this kind of reasoning will be used in this research in order to explain the process of building the analytical model of the influence of the property rights regime on land development processes. Abductive logic lays more emphasis on empirical data and allows for more dynamic interaction between data and theory in contrast to other kinds of reasoning, i.e. deduction or induction¹². The most interesting application of abductive logic to this research lies in the fact that the starting and ending points for the abductive research process can be found in theory or phenomenon or in both (see Figure 1).

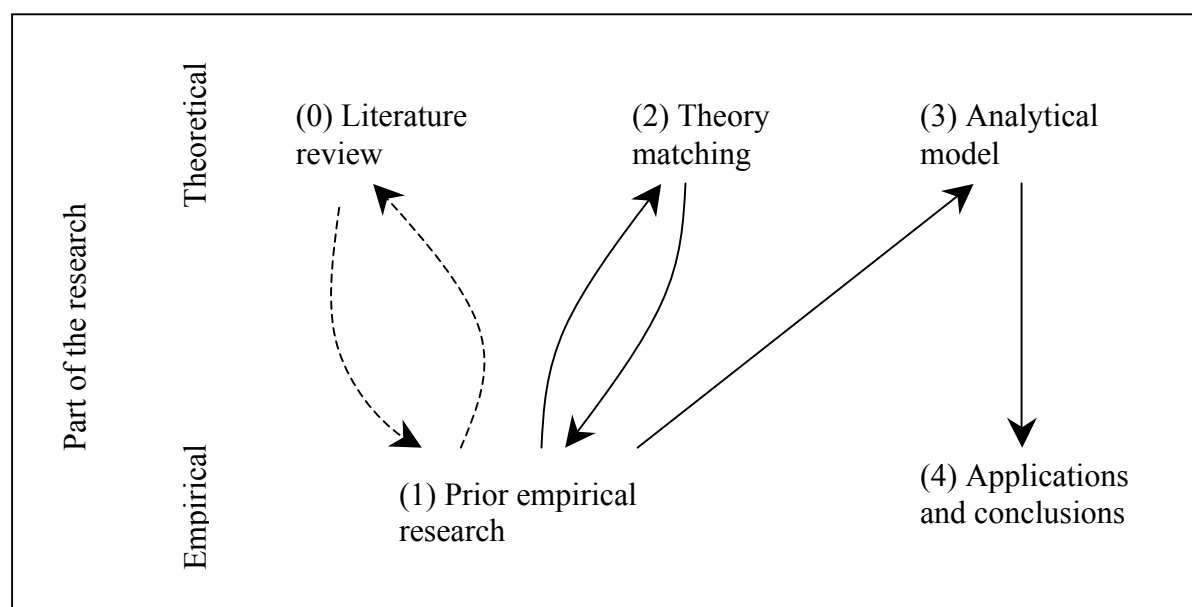


Figure 1. The research process

The research started with a literature review of the current approaches used to study built environment (point 0 in Figure 1). Then the research moved towards the empirical data concerning land development processes in countries concerned in the comparative research, as well as other mainly European countries (point 1 in Figure 1). Further on, the empirical findings were combined with the existing literature. The aim of this part was to limit the scope of inquiry, by addressing more precisely the topic that will be examined. The property rights regime concept was used and further developed (point 2 in Figure 1). Finally the

¹¹ Different logic of reasoning can also be referred to different research approaches, e.g. deductive logic is often used in quantitative research.

¹² Lindholm (2008, p.10-11) discussed three reasonings: deduction, induction and abduction. Deduction focuses on extracting statements from general knowledge in order to test these statements on the basis of facts and is central to positivism. Induction reasons through moving from a specific case or collection of observation to general law.

analytical model was proposed (point 3 in Figure 1) and applied in comparative research (point 4 in Figure 1).

In phase two empirical data will be compared and discussed. In the final discussion, the elements of deontic logic will also be applied in this research. Deontic logic is the field of logic that is concerned with the issues of obligation, permission, and related concepts (Stanford Encyclopaedia of Philosophy).

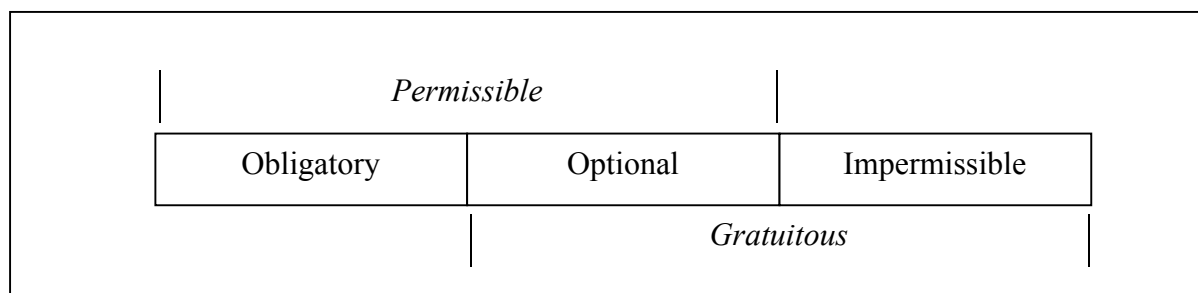


Figure 2. Deontic propositions of rules

In deontic logic all propositions are divided into three jointly exhaustive and mutually exclusive classes: every proposition is obligatory, optional, or impermissible (Fig.2). It is important that no proposition falls into more than one of these three categories. Furthermore in deontic logic the permissible propositions and the gratuitous propositions are distinguished. The permissible propositions are those that are either obligatory or optional. The gratuitous propositions are those that are impermissible or optional. (Stanford Encyclopaedia of Philosophy)

Ostrom (1990, p.139-142) argues that all recurring situations are shaped by a set of institutional rules, which are prescriptive statements that forbid, require, or permit some action or outcome. All three deontic operators - forbid, require, or permit – should be used in the definition of rules, because any action or outcome that is not required nor forbidden is permitted. Therefore, the absence of a rule forbidding or requiring an action is logically equivalent to the presence of a rule that permits an action. Therefore, the limitation of conception of rules to prescriptive statements containing only required or forbidden actions and outcome do not allow identifying the set of rules that constitute a situation¹³. The property rights regime is constituted by rules. This kind of reasoning will be used while presenting the results of the influence of the property rights regimes on the methods of land development.

Significance of the study

The understanding of the mechanisms underlying the changes in the outcome of land development processes is significant for the built environment, not only for countries building new systems of rules for planning and development. In general, urban land development

¹³ However, it might be only afterwards revealed that an action was not permitted but forbidden – e.g. after appeal in the court

processes deserve attention because the potential for profit in urban land development processes is high and involves a substantial amount of money. Land and property development processes are important for urban economics because there is an obvious relationship between these processes and, for example, suburban growth in the cities¹⁴.

The new industrial revolution in the developing countries, the global changes in the economy and their local impacts, and the new competing ways of allocating development in Europe have resulted in a growing number of urban challenges and require a broader understanding of the property arrangements, ability to use instruments and methods of land policy. The land development processes in Europe and in the world are time-consuming and there seems to be a large demand for more efficient and sustainable development. A better understanding of the relationship between institutional arrangements and the way the land is developed will contribute to the knowledge of how to design a system of rules, which would then further allow achieving the goals of land policy. Therefore, the challenge of this study is to contribute to the institutional design of the system of rules, which can be used as land policy tools.

Structure of the thesis

This thesis consists of ten chapters and is organized into two parts in addition to the introduction. The first part provides the theoretical framework of the study and consists of five chapters. In general, in the social scientific research the phenomena are studied only from a specific point of view. This point of view, called ‘theoretical framework’, presents the background for the conceptual understanding of the studied phenomena. Presented in the first part of the thesis, the key up-to-date theories and concepts set up the background for further discussion of the research problem. Each chapter narrows and focuses the purpose of the study. The first two chapters in the theoretical framework aim to justify the research choice to pay attention to the property rights theory. In Chapter Three the concept of the property rights regime is discussed. Chapter Four presents the empirical research on the importance of formal rules in planning and development in an international context. Finally Chapter Five concludes the theoretical part by presenting the analytical model for further empirical research and comparison.

More precisely, Chapter One underlies the research choice to discuss the built environment from the perspective of the institutional economic theory. This chapter analyses the discussion grounded in welfare economics about market versus government (market and government failures) in land use planning and development. It starts with an explanation of the approach of the neo-classical and welfare economics to planning and development issues. It is followed by the introduction of arguments on the ability of the neo-classical economic approach to provide the sufficient theoretical background to study the processes of the built environment. Further in this chapter a number of alternative approaches to the analysis of land development process based on the mainstream approach are handled.

¹⁴ For instance, as land values in the city increase, the particular plots should produce a higher yield in order to keep the place or it would be replaced by more profitable uses. On the other hand, if much the same yield can be achieved in a peripheral location, where the land prices are lower, there is no incentive to stay in the city centre. Therefore, the land and property development processes are in the heart of urban economics.

Chapter Two presents ‘state of the art’ institutional economic theory. The attention to the process, which changes the urban spatial structure, was emphasised by Ball (1986) and followed by Healey and Barret (1990). In this chapter the current approach is summarised in order to find out the direction for further research. The chapter starts with an explanation of the complex nature of the concept of institutions. The definitions and delimitations of institutions are discussed in general and in the context of property related research. This chapter explains the key assumptions of the institutional theory, the institutional-economic theory and difference in relation to the neo-classical approach. The arguments why we should pay attention to the institutional economic theory in the research concerning built environment are summarised. In addition, this chapter reviews the models of land development process based on an institutional approach, institutional-economic approach and explains the research choice to draw attention to the formal rules and the property rights theory. The intention of this part is to make clear that the goals and subjects of study in the discussed analyses differ from the perspective that has been chosen in the present study.

Chapter Three reviews the way property rights theory is used in planning and development studies and discusses what is the current approach in these studies. The chapter starts with an introduction to the property rights theory. The key theoretical concepts are presented and explained. Furthermore, the approach of property rights theory to planning and development issues is reviewed. This chapter aims to find the elements of property rights theory, which could be applied further in developing an analytical model of the influence of formal rules on land development process. This chapter also attempts to discuss how property rights should be delineated and assigned to improve market efficiency. The concept of the property rights regime, which will be used in further analysis, is introduced.

Chapter Four discusses the rules and criteria in relation to the property rights regime, which seem to be explanatory variables of the different outcomes of the land development processes. This chapter is the result of the reviews of the empirical studies, mainly from European countries, where the typical property rights context and its impact on market processes have been taken into consideration. The focus in this chapter was not put on the behavioural aspects of actors but to the formal rules, which constitute the property rights regime on land. Understanding of the importance of formal rules adds to the process of building the analytical model in my research and further focusing on the study.

In Chapter Five I will make use of the institutional and the property rights theory to develop a framework for the analysis of the influence of institutions on land development. Therefore, in this chapter the assumptions of the study are summarised and the analytical model to study land development based on the property rights approach is proposed. The problem area, which will be the subject of consideration in the empirical part of the thesis, is precisely delineated and explained.

Part Two of the thesis compares the property rights regimes in Poland and Finland and discusses them in a theoretical context of theories and concepts presented in the first part of the thesis. In this part the elements of property rights regimes are compared and conceptualised, as well as the relevance of the property rights regime to land development processes is discussed. The first chapter (Chapter Six) conceptualises the elements within the property rights regime. The next three chapters cover the comparative analysis of the explanatory variables within the property rights regimes, selected in this study. Chapter Seven

considers with particular attention, the position of the municipality in the development process. Subsequently Chapter Eight covers the discussion about the flexibility and certainty in the development control. Chapter Nine discusses the economic right in land development process. Finally the concluding chapter, Chapter Ten, discusses the link between the property rights regime and the land development processes and concludes the research.

The detailed empirical investigation into the systems used in the two countries is attached to the thesis as appendices. The selected elements of the property rights regime and methods of land development are described respectively for Finland – Appendix A, and for Poland – Appendix B. Each appendix tries to follow the same study raster. However, the order of the discussed issues sometimes depends on the specific context in the given country. From the property rights theory perspective the delineation and allocation of the rights and duties in respect to land development processes in each country is the subject of enquiry. Both appendices also contain an analysis of the outcome of the land development process in the form of preferred method of land development.

PART ONE

THEORETICAL FRAMEWORK

Chapter One

A NEOCLASSICAL AND WELFARE ECONOMICS APPROACH TO STUDY BUILT ENVIRONMENT

The decision to use insights of the institutional economic theory to study built environment requires an explanation. Therefore the following chapter presents a discussion about ‘market versus government’ (market and government failures) in land use planning and development. The chapter begins with a review of the neoclassical and welfare economics approach to planning and development issues followed by the critiques of the mainstream approach and the traditional discussion of ‘market versus government’ in land use planning. Also in this chapter the models of land development which are derived mainly from the neo-classical and Marxists economics approach are discussed. This introduction gives a starting point and understanding of why I am going into the third mainstream approach, i.e. the institutional economics.

1.1 A neoclassical and welfare economics approach to planning and development. Market failure

A neo-classical economics approach assumes that the market is spontaneous and perfectly competitive, led by what Adam Smith (1776) called the “invisible hand”. The focus is on the determination of prices and outputs in markets through equilibrium between supply and demand. In a perfectly competing market, demand and supply will become equal at a competitive equilibrium that leads to an optimal allocation of resources (Marshall’s curves of supply and demand). There are three main assumptions in neo-classical economics: people have rational preferences, individuals maximize their utility and people act independently on the basis of full and relevant information¹⁵. Economic efficiency¹⁶ is measured by adopting the Pareto-optimality condition: “*welfare is maximized when no one can be made better off without somebody else being made worse*” (Harvey 1987, p.4). In a Pareto optimum¹⁷ situation, resources are allocated optimally (Figure 1).

¹⁵ Healey (1997, p.55) summarised the approach in the following way: “*world is constituted of autonomous individuals, each perusing their own preferences in order to obtain material satisfaction*”. It could be said that each person is seeking an optimum situation to satisfy his/her needs, given a certain budget.

¹⁶ In welfare economics, the relation between the input (allocation) of scarce resources and the output of desired goods and services is evaluated by using the concept of the allocative efficiency. Pareto optimum is the optimal allocative efficiency (Needham, 2006, p.53). Besides the efficiency criterion for evaluating the performance of the economy also the equity criterion is discussed (Mills & Hamilton, 1989, p.147-157).

¹⁷ It is important to emphasise at once in this introductory part of the thesis the criticism of Pareto-concepts. For instance Van der Krabben (1995, p.75) criticised this concept in the following way: “*In a complex world with incomplete knowledge, there is no such thing as one Pareto-optimum; there are many of them. Even a world with complete knowledge would have many Pareto optima. But the concept has no meaning in an uncertain world since it cannot be established whether or not such an optimum has been reached. Of course, if loosely defined, the concept of Pareto optimum can be used as norm for acquiring a ‘better’ situation for the majority concerned, but in that case mathematical precision is lacking. The use of such a concept in choosing policy instruments for any problem, including issues related to property market functioning, could be misleading if it were to be used as an exact standard.*” For the critic of Pareto optimum concept see also Needham (2006, p.54).

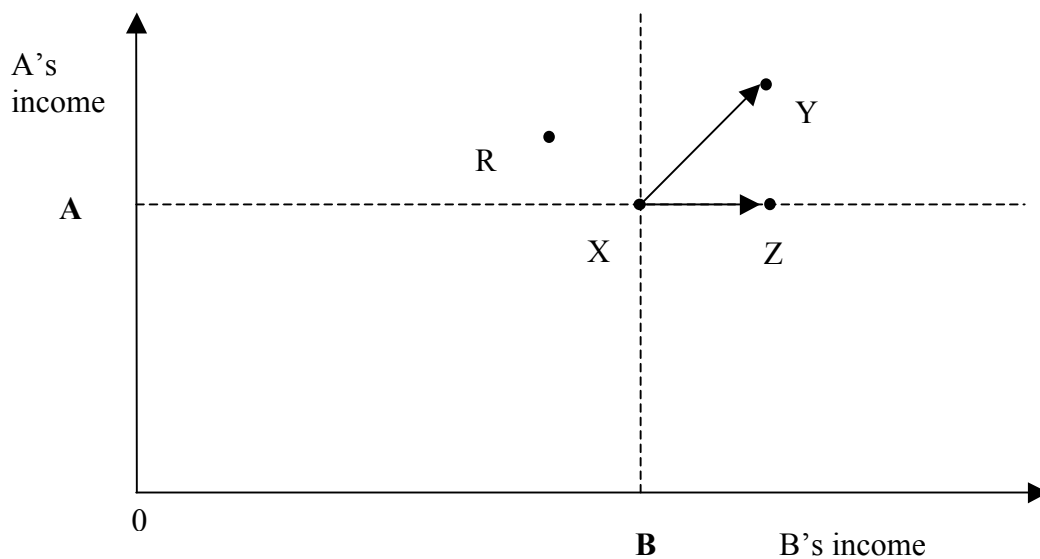


Figure 3. Pareto (XY, XZ) and non-Pareto improvements (XR), based on Harvey (1987, p.4) and Begg (2003, p.214-217)

According to the neo-classical economics approach, a pattern of prices and rents on the land and property market will be established in such a way that given sufficient time (the long period), land resources are allocated according to their most profitable ('highest and best') use. The interaction of demand and supply will result in equilibrium in market rent. The competition in the land and property market induces owners to switch resources to the use which yields the highest net return. (Harvey 1987, p.19-38)

The above approach assumes a perfectly competitive market exists. Many studies of urban economics assumed there would be an unproblematic relation of supply and demand. But in practice the market may not achieve full efficiency in the allocation of resources. In the middle of the twentieth century several economic depressions showed that the ideal market place is not always (and might never be) fully or perfectly competitive. The market failures (named after Arthur C. Pigou) are constraints which affect the competitive equilibrium. Therefore the resources are not allocated efficiently according to the Pareto optimum situation, but the allocation is sub-optimal, Pareto-wise. (Buitelaar, 2002)

The problems leading to market failure (or reasons for resource misallocation) were explored in a dispute between different representatives of neoclassical and welfare economics. In urban economics, following a general discussion, many types of market failures were distinguished: imperfect competition (for example monopoly and monopsony), externalities¹⁸ (inadequate

¹⁸ For instance Mills & Hamilton (1989, p.158) pointed out that the term externalities was badly abused in urban economics and has defined the external effect in the following way: "the action of one person or institution may

expression of costs or benefits), pure public goods (nonrivalrous & nonexcludable), management of common-pool resources, transaction costs, imperfect information. (Mills & Hamilton, 1989, p.157-162, 331-335, Balchin *et al.*, 1993, p.139-149, see also Needham, 2006, p.55-57 for the explanation about the Pigovian corrections to market failures in land markets)

Land and property markets often fail because of their specific features. It is stated by many authors that these markets are imperfect by nature, or are one of the least efficient and never reach a state of equilibrium. The reasons for the inefficiency of the land and property markets were noted for example by Balchin *et al.* (1993):

“The imperfect knowledge of buyers and sellers, the ‘uniqueness’ of each site and building, the strong preference of establishment for existing sites, the unwillingness of some owners to sell despite the certainty of monetary gain, the absence of easily recoverable investment in costly and specific developments, the immobility of resources once they are committed, the possible loss on initial investment, the time-absorbing and costly process of seeking and acquiring new locations, the expense and legal complexity of transferring property, the length and legal rights of property interests, the influence of conservationists, the slowness of the construction industry to respond to changing demand, the monopoly power of planning authorities, property companies, mortgage institutions, sellers of property and the design professions.”

The neo-classical welfare economics theories provided a rationale for taking command over land markets. The concepts of externalities and market failures were used somewhat uncritically to justify public land use planning. This approach suggests that the economy could be “managed” to avoid market failures and a price mechanism could be used to deal with the problem of externalities¹⁹. This rationale, when transferred to ‘land issues’ resulted in the introduction of different kinds of land market regulations and policies. In the case of land market, government interventions to solve the problems of market failure took a form of, for example, zoning or stimulating the land supply by different kinds of subsidies or by public land development (Van der Krabben, 2009). Almost in all countries, private activities on land market were regulated with land-use regulations. Lai (1997, p. 172-173) summarized three policy packages for planning derived from the economics rationale of Pigou (1932), directed to correct the problem of externalities, in the following way:

“Policy Package 1. The inception of a statutory zoning and development application system which is intended to have remedial and preventive effects upon externalities.

Policy Package 2. The introduction of a set of statutory and administrative rules, policies, directions and standards which regulate directly the process of land use activities with the object of removing or keeping negative externalities or their impacts below some pre-determined ceilings.

affect the welfare of another in ways that cannot be regulated by private agreements among the affected parties.”

¹⁹ This is also suggested by the property rights theory. A discussion of the differences between both approaches will be presented in Chapter Three

Policy Package 3. Direct government infrastructural investment, which tackles negative externalities."

1.2 Government failures

The most significant argument against welfare economics is the lack of attention paid to the institutional context. In addition, opponents of the welfare economics approach argue that not only do market failures exist but also public or government failures or non-market failures exist, too, as Buitelaar (2002) found:

"Although markets often do not succeed in achieving socially efficient results, government intervention is not necessarily a guarantee for achieving these (Levačić, 1991:45). In contrast to many welfare economists who talk about market failures, one could also argue, as many followers of Coase do, that there are public or government failures (Levačić, 1991, Lai, 1997; Webster, 1998; Pennington, 1999), or nonmarket failures (Wolf, 1979)"

Wolf (1979) discussed 'non-market failures'. Ogus (1994, p.40) discussed 'regulatory failure'. Therefore markets do not often succeed in achieving economically efficient results because of market failures, but government policies and intervention may lead to so-called government failure also or other failures can appear on the market too. The issue of government failures has only recently come into discussion, due to the development of public choice theory and new institutional economics or transaction costs theory. (Buitelaar, 2002)

Webster (2005) argues that it may even be that government failures are more strategic and harder to recover from than market failures because markets have a habit of testing the benefits of innovations more quickly than governments. That is why *"the bad legislation and policy tends to survive for a long time – until public unrest or accumulated wisdom force the costly process of change"*. For example, even in Wikipedia (11.4.2007) among the many types of government failures mentioned are: problems at the legislative level (crowding out, logrolling, pork barrel spending, rational ignorance, rent seeking, short time horizons), problems at the regulatory level (regulatory arbitrage, regulatory capture, regulatory failure, regulatory risk, rent seeking), generalised problems of information assessment (environmental impact, imperfect information), market distortion (by tax structures, by regulatory ordering, by subsidization, risk assumption) and unintended consequence.

In general a 'welfare-state' requires heavy government involvement and expenditure. This includes the different forms of intervention to correct problems caused by externalities and other efficiency problems in land development. Nowadays, the government in general is being widely questioned, and the budgets of public bodies are being cut, as was put by Sorensen (1994, p.198):

"Our era is reconsidering the ends and means of government in general in view of limited public finance; concerns over national economic efficiency; and a growing community preference for individual responsibility, self help, and small government. Planning is not immune to these trends."

1.3 The traditional discussion: ‘market versus government’ in land use planning. Failures and advantages of both approaches

The discussion concerning market and government failures leads to the traditional debate between two extremes: state control and market forces. The debate continues between proponents and opponents of Keynesian interventionism on the one hand and the free market liberalism on the other. This debate has been topical though the years and also concerns the planning and development field. Different solutions have been developed. Keynes proposed to stimulate consumer demand and full employment through the welfare state. The government intervenes in the market e.g. by subsidies to encourage people to purchase housing. However, the Keynesian strategy seems to have ground to a halt in the stagflation – a situation of economic slow-down combined with rising inflation. In response, the neo-liberal political movements (the US and Britain under the conservative Prime Minister Margaret Thatcher in the 1980s in Britain) focused on the supply side of the economy. The role of bureaucracy and politics in the management of the economy built up through the welfare state were reduced and restricted. (Healey 1997, p.10-14, Taylor 1998)

The debate was also continuing in land-use planning. The market as an economic mechanism for allocation of land was a subject of severe criticism. Balchin *et al.* (1993, p.272) pointed to three principal reasons:

- “(1) As a means of allocating land between different uses the market may seem to be inefficient, suffering from inherent imperfections – demand and supply overall being rarely in equilibrium*
- (2) The pattern of land use and values as determined by the price mechanism disregards the needs of the less profitable, and often unprofitable yet socially desirable, users of land for such purposes as schools, hospitals and public open spaces*
- (3) The financial nature of the property market, with its stress upon private profit, maintains and frequently highlights national inequalities of income and wealth, and usually does so in a way that is a reflection of the ‘monopolistic’ nature of land-ownership rather than an indication of entrepreneurial ability.”*

Therefore, the critique of markets relates to the ignorance of social needs, maximalisation of profit and pecuniary satisfaction. It also contrasts the private interests to the public interest. On the other hand some academics claim for more laissez faire approaches to spatial problems. They argue that ‘more market’ creates a higher level of economic efficiency in coordinating land use decisions (Ellickson, 1977, 1991; Pennington, 1999, p.54-55). Their arguments are built around lower transaction costs, quicker responses to changing tastes and circumstances, and more individual freedom. But in turn the Pigovians will argue that ‘the market’ often fails to operate efficiently. Consequently, correction by government intervention is justified.

The proponents of planning regulations support the statement that the high degree of public intervention in the form of planning control removes some of the imperfections present in the land and property market. The rules introduced in the framework of planning and development control reduce uncertainty and lessen risk. It is argued that planning controls are

necessary to: secure a better environment²⁰, and ensure the most appropriate use of land resources having regard to sustainable issue. From the point of view of the community as a whole, planning controls can obtain positive benefits such as improved knowledge, allowance for externalities, solving the problem of the imperfect competition, the secure provision of public and collective goods, and improvement of the mobility of resources or the redistribution of income. The argument for government intervention emphasizes also the aspect of social welfare by the possibility to realize planning gain. (Harvey & Jowsey 2004, p.189, Balchin *et al.*, 1993, p.274, 281-284)

However, when government intervention replaces the market there are arguments that governments act too slowly and unresponsively to 'what people want'. The injustices of the planning system are also pointed out as a criticism of government intervention. During the planning process the land use and land value is decided by means of individual administrative decision under the more or less effective control of a democratic political system. The arguments against public intervention are numerous. Developers can view planning controls as being negative, imposing frustrating conditions on their well-researched systems (Harvey & Jowsey 2004, p.189). It is argued that for example, by planning intervention the financially rewarding development is restricted (see for example Balchin *et al.*, 1993, 281-295)

In relation to urban planning and development, the discussion about government failures resulted in the questioning of the idea of comprehensive, rationalistic systems analysis and planning²¹ (Webster 2005). The result of this was the deregulation and decentralization of

²⁰ As it is presented in American literature land use controls and zoning may be used to limit population growth and in this way control the undesirable side effects of growth. The city can also refuse to extend urban infrastructure (e.g. sewers, schools), or limit the number of building permits issued. (O'Sullivan, 2003, p.228-232)

²¹ For the first five decades of the 20th century urban planning has been regarded as an exercise in civic design. This approach for many years influenced the planning education and the self-image of planners in practice. The planners of civil design tradition, who were the master-designers of the built environment passionately believed that the comprehensive design of new settlements is the best way to achieve balance and order through the city. The planner was in control of the built environment. The knowledge about a given object was translated into plan via the intuition or inspiration of the planner. In the 1960's new approaches emerged in three related areas of controversy to the previous approach. The three areas as defined by Adams (1994) are the analytical, urban forms and procedural debates. However, these approaches were also mistaken that the planner was in control of the built environment. These approaches assumed that the implementation of plans is an unproblematic administrative process that follows on naturally. They forget that the owners can create the pressure on politicians to overturn the supposedly neutral recommendations of planning experts. Since the 1980's instead of seeing planning as a policy formulation, the approach emerged of planning as an interactive process of negotiation and bargaining between policy makers and implementation agencies. The approach was labelled as the argumentative, interpretative or communicative approach (Healey, 1997, p.28-29). However, Healey pointed out that the communicative turn in planning theory does not pay sufficient attention to the changing understanding of urban region dynamics evolving in regional economic analysis, urban geography and urban sociology. In the 1990's Healey described the new challenges for planning. She stated (Healey 1992) that: "*The challenge for planning in the 1990s is to 'adapt' not only to new substantive agendas about the environment and how to manage it, but to address new ways of thinking out the relation of state and market, and state and citizens, in the field of land-use and environmental change*". As a result the collaborative turn emerged. Based on the communicative approach in planning theory and the new institutionalism Healey (1997) proposed the collaborative approach.

tasks in urban planning and development and lessening of public control of land use decisions as well as the growing importance of public-private partnership and the discussion about more market oriented planning.

All the arguments are incomplete when subjected to economic analysis and the discussion is never ending, as for example Harvey & Jowsey (2004, p.189) argue:

“Consider the ‘better environment’ argument. Naturally a more pleasant environment is something that everyone would like. But liking is one thing, achieving is another. Usually any improvement of the community’s welfare in one direction imposes a cost in terms of something else that has to be forgone in order to achieve that improvement. That is, there is an opportunity cost of a better environment. A ‘green belt’, for instance, keeps land in agriculture – a lower use compared with housing – and also extends the journey to work of those city workers who live beyond it.”

Lai (2005) emphasizes the ambivalence in discussing the role played by any observed institution of state planning. He argues that on one hand state planning can reduce the cost of competition over land resources. On the other hand, it can, for instance, serve a group interest (planners!). Also Webster and Lai (2003) argue that academic discussions about urban governance are frequently polarized: *“Those espousing a public service ethic often demonize the market while some urban economists and radical libertarians fail to appreciate the need for strong state apparatus”*. In order to emphasize the ambivalence in the discussion about state control versus market solutions, it is also worth noting that the theoretical background for the discussion does not convince as to pay attention to problems formulated in such a way. From the theoretical perspective, three models were frequently used as metaphors in the discussion about state control versus market solutions. These models are known as ‘the traditional policy analyzing models of governing the commons’ and are based on a theory of collective actions: tragedy of the commons, the prisoner’s dilemma game, and the logic of collective action (Ostrom, 1990). In the tragedy of the commons, the free access and unrestricted demand for a finite resource ultimately dooms the resource through over-exploitation. Garrett Hardin (1968) uses the example of a pasture “open to all”. *“Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limits – in a world that is limited”*. In the prisoner’s dilemma game there is the paradox that individually rational strategies lead to collectively irrational outcomes. It is a game, in which two players may each “cooperate” with or “defect” (i.e. betray) the other player. No matter what the other player does, one player will always gain a greater payoff by playing defect. Since in any situation, playing defect is more beneficial than cooperating, all rational players will play defect. In the logic of collective action (Olson 1965) - individuals in any group attempting collective action will have incentives to “free ride” on the efforts of others if the group is working to provide public goods. According to Ostrom (1990 p.6) in the heart of all three theories is a free rider problem: *“whenever one person cannot be excluded from the benefits that others provide, each person is motivated not to contribute to the joint effort, but to free-ride on the efforts of others.”*

All these theoretical models were used as metaphors by many scholars who presumed that the process occurs in natural settings. Ostrom (1990 p.6) argues: *“What makes these models so dangerous – when they are used metaphorically as the foundation for policy- is that the constraints that are assumed to be fixed for the purpose of analysis are taken on faith as being*

fixed in empirical settings, unless external authorities change them. The prisoners in the famous dilemma cannot change constraints imposed on them by the district attorney; they are in jail. Not all users of natural resources are similarly incapable of changing their constraints". The paradox here is that, these models were also used as a policy foundation arguing for a private enterprise system (a system of private property rights) or on the other hand arguing for central governmental control of natural resources (only external Leviathan is necessary to avoid the tragedy of commons). In both cases it is expected that a solution to the problem must come from outside and be imposed on the individuals affected. Therefore there is a presumption that individuals cannot organize themselves and always need to be organized by external authorities. (Ostrom 1990, p.25)

However, many solutions exist to cope with many different problems. Ostrom (1990, p.14) argues that *"...Instead of presuming that optimal institutional solutions can be designed easily and imposed at low cost by external authorities, I argue that "getting the institutions right" is a difficult, time consuming, conflict-invoking process. It is a process that requires reliable information about time and place variables as well as broad repertoire of culturally accepted rules. New institutional arrangements do not work in the field as they do in abstract model, unless the models are well specified and empirically valid and the participants in a field setting understand how to make the new rules work."* In the traditional debate there are two extremes: state control and market forces. However institutions are rarely either private or public ("the market" or "the state"). They are rather private-like or public-like. For example, users of common pool resources have developed a wide diversity of their own arrangements. The law firms can serve also as an example of voluntarily organizing themselves (Ostrom 1990, p.25). Authors of many policy prescriptions often advocate oversimplified, idealized institutions, paradoxically, almost "institution free" institutions, as Ostrom (1990, p.22) put:

"An assertion that central regulation is necessary tells us nothing about the way a central agency should be constituted, what authority it should have, how the limits on its authority should be maintained, how it will obtain information, or how its agents should be selected, motivated to do their work, and have their performances monitored and rewarded or sanctioned. An assertion that the imposition of private property rights is necessary tells us nothing about how that bundle of rights is to be defined, how the various attributes of the goods involved will be measured, who will pay for the costs of excluding nonowners from access, how conflicts over rights will be adjudicated, or how the residual interests of the right-holders in the resource system itself will be organized."

The contemporary institutional analysis draws attention to particular structures of these institutional details which are important because they influence the equilibrium of the market. Webster and Lai (2003) suggested that instead of polarization of discussion about 'markets vs. planning' the attention should be directed towards co-evolution of the state and markets, as they put it:

"Our position in this respect is that state and markets co-evolve, complementing each other and, by trial and error, discovering better ways of distributing responsibilities between private and public sector and between private and collective action"

1.4 Criticism of the land development models derived from the neo-classical tradition

In urban economics, criticism concerning the neo-classical tradition aside from the excessive simplification of reality²², the general lack of interest in the land and property development processes and institutional factors is emphasised (Healey 1992). The neo-classical tradition is determined by the price mechanism as it operates to keep the supply and the demand in equilibrium. This tradition applies the equilibrium models into the study of built environment in a given context. No attention is paid to institutional or cultural factors that influence supply-demand relationships. Healey (1992) argued about neo-classical traditions that: *“This framework emphasizes the impact of ‘demand –led’ considerations and ‘supply-side’ constraints on development activity, but this approach gives insufficient analytical attention to the difference between occupier (user) and investment demand, nor does it provide the means for examine the methods used by agents within the development process”*. Therefore the neo-classical theory does not sufficiently explain the processes, which are responsible for changes in the structure of the urban system, neither does it pay sufficient attention to the context within which the changes are taking place (see also Van der Krabben 1993, 1995). On the other hand the ideas concerning the built environment derived from Marxist economics (the second important mainstream economics) dismisses the notion of markets in the conventional sense. It is based on a concept of struggles between the forces of capital and labour, which generated the structure of power and interests between groups for control of the surplus generated in production (Healey 1992, 1997, p.35-38). Therefore, the theory does not pay attention to the process of changing the built environment.

In order to understand the built environment a lot of analytical models were derived from the neo-classical tradition and Marxist economics. Healey (1991a)²³ explained the existing practice and identified four different types of models:

- (i) *“Equilibrium models, which assume that development activity is structured by economic signals about effective demand, as reflected in rents, yields etc. These derive directly from the neo-classical tradition in economics.*

²² Webster (1998) criticized the welfare economics approach, which is a part of the neo-classical approach and pointed out five shortcomings from a public choice point of view. He emphasized the lack of attention for institution, transaction costs, process efficiency, the problems of the measurability of policy benefits and the self-interested behaviour of politicians, planners and residents. In the field of property research Kauko (2002 p. 28) summarized the criticism on the validity of the economic equilibrium approach in the following way: *“First, the theoretical underpinnings of the analyses – that is, the rational preferences of consumers and an economic system that is behaving well – might not be realistic. Second, this approach only measures economic values, thereby ignoring individual behavioural and cultural factors. Third, this approach does not pay enough attention to more formally defined rules and arrangements. Fourth, it is not flexible enough to cope with imprecision (the fuzzy element) in price formation. Fifth, this approach fails to capture the spatial (or any other) discontinuity or nonlinearity prevailing in the price formation of house prices. Sixth, this approach precludes the possibility of drawing conclusions about average utility-maximizing behaviour on the market level of recognizing individual tastes: outlier cases of behaviour that might become ‘trendsetters’.”* See also Needham (2006, p. 52-75) for the detailed elaboration on the shortcomings in the Pigovian analysis with respect to the activity of physical development.

²³ Gore & Nicholson (1991) distinguished a further approach that seeks to identify the particular institutional, financial and legislative framework or “structure provision” for each type of development. This approach produces a separate model for each development sector. Ratcliffe & Stubbs (1996) calculated that Healey (1991 a,b) and Gore & Nicholson (1991) together detailed fifteen different models of development process.

- (ii) *Event Sequence Models, which focus on the management of stages in the development process. These derive primarily from an estate management preoccupation with managing the development process.*
- (iii) *Agency Models, which focus on actors in the development process and their relationships. These have been developed primarily by academics seeking to describe the development process from a behavioural or institutional point of view.*
- (iv) *Structure Models, that focus on the forces which organize the relationship of the development process and which drive its dynamics. These are grounded in urban political economy.”*

A more fundamental description of the premises and the structure of the conceptual models based on these theories as well as the critique of neo-classical and/or Marxist urban theory falls outside the scope of this thesis, but can easily be found elsewhere. The analysis of the conceptual models based on these theories is provided for example by Van der Krabben (1995, p. 44, 49-52, 59-64).

Van der Krabben (1995, p.36) argues that the variations in the outcome of development processes cannot fully be understood within of the concept of optimal allocation that is central to the neo-classical models of urban development (both, the standard neo-classical models as well as more advanced neo-classical models that are more realistic with respect to the meaning of the neo-classical assumptions). The neo-classical concept implies that the demand of firms, institutions and households for buildings is met by supply and that market mechanisms lead to an equilibrium in which all these firms, institutions and households, given their budgets and their preferences, are situated on an optimal location. This would imply that the international variations in urban development processes are the results of differences in budget constraints and preferences of the actors that are looking for new locations and new buildings, and of differences in geography and history. Perhaps, in some cases budgets and preferences are different, but it is unlikely that they differ on such a large scale. Therefore, the neo-classical studies of urban development that are concerned with supply-side constraints of the production of land and property and the way public regulation of property supply affects land and property prices are hard to defend.

As a result of the neglect of institutional factors in the above approaches, different authors proposed an institutional analysis of the urban economy as a better approach to explain the structure and processes of the built environment (Healey 1992, 1998, Ostrom 1990, Van der Krabben 1995, Ball 1998, Keogh & D’Arcy 1999).²⁴ Therefore institutional models were added to the portfolio of analysis of the built environment. In these models the analysis of institutions, their formation, operation and the path of changes as well as an influence on behaviour in society has become a major subject of inquiry. It was assumed that the institutional approach adds valuable insights to the understanding of the built environment and the urban development by paying attention to institutional factors – notably the strategies of actors or the distribution of the property rights on land.

²⁴ The institutional approach is also a subject of criticism. Critiques of the institutional approach is presented for example in Buitelaar (2002).

Van der Krabben (1995, p.28-29) explained the differences between the theoretical approaches to property market functioning²⁵. A neo-classical approach takes into consideration the price mechanism as a starting point. The property prices and rent levels are explained in the first place. The institutional context is either neglected or considered as given in the explanation of prices. In some cases institutions are used to explain anomalies in market outcome, but institutions are kept outside neo-classical theories. The institutional economics approach explains the institutional relations underlying market processes as a starting point. The institutional context and its impact on urban development processes are explicitly explained in the first place. Van der Krabben (1995, p. 39) argues:

” The urban spatial structure is, logically, the outcome of processes taking place on the urban land and property markets. However – and this is brought to attention in particular by Ball (1986) and Healey and Barrett (1990) – the processes through which these changes in urban spatial structure have been accomplished have been almost completely neglected in the international literature on urbanization and urban development. Ball has argued that ‘the built environment in urban theories is generally treated as a passive backdrop to other social processes’ (Ball, 1986, p.447)”.

Healey and Barrett (1990, p.89) observed the same shortcoming in urban theory:

“The role of landownership, the organization of the construction industry, the nature of the finance invested in urban development and the significance of intermediaries, from developers to property consultants, lie hidden or are given little more than a passing reference in many historical accounts of urban development (...)”.

1.5 Recapitulation

This introduction emphasised that the argument of price-setting processes on urban land and property markets are only a matter of demand and supply, is difficult to defend. The problems which appear in urban development cannot be explained by using the explanatory variables in the form of imperfect functioning of the price mechanism. When I refer to my research questions, the neoclassical and welfare economics theories seem not to provide explanatory tools. I will argue following, e.g. Healey 1992, Van der Krabben, 1995, Buitelaar, 2002 that the neo-classical economics approach does not provide the sufficient theoretical background needed to study the processes of the built environment. An approach to land development processes is needed, which also focuses on ‘institutional matters’. The approach of neo-classical economics does not pay sufficient attention to the processes of development neither to the institutional factors that influence the outcome of real estate market processes and the spatial-economic restructuring of urban areas. This theory has taken these issues as given. Although the theory is valuable it is not complete. It is not suggested here that the neo-classical urban economic theory offers no clue for the analysis of the urban real estate development processes. Within each of the recognized paradigms of neo-classical or Marxism, valuable theoretical analyses can be found of the functioning of urban real estate

²⁵ Although these two approaches are fundamentally different, they are not conflicting but they can complement each other.

markets (Van der Krabben, 1995, p.59). However, for example Ball (1986) said already that any urban theory ignoring the production of the built environment is unable to explain urban development properly. Also the traditional discussion about market versus government in land use planning does not bring us much further in explaining the processes of the built environment.

The lack of academic interest in land and property development is regrettable for several reasons. Healey (1992) summaries it as follows:

“(...) the way in which land and property are themselves produced and consumed enters into the processes of economic production and consumption. Knowledge of the processes through which the built environment is produced and used, and in particular the processes of land and property development, is thus critical to our understanding of urban development and our attempts at managing urban development processes.”

In the next chapter I will explain the concepts of institutional economic theory, the scope of institutional models of land development and its significance while studying the built environment. I will review also the current institutional approaches to study the built environment and present my further research choice.

Chapter Two

INSTITUTIONAL AND INSTITUTIONAL-ECONOMIC THEORIES

The objective of this chapter is to further explain the theoretical perspective of the study. This chapter presents an analysis of the institutional approach starting with a presentation of definitions and delimitations of institutions in a general development discussion and in respect to land and property markets. It is followed by a discussion about the models of land development derived from the institutional approach. In addition, economic approaches to study institutions and institutional-economic models of land development are reviewed. At the end of this chapter my further research choice is explained.

2.1 Definitions and delimitations of institutions. Institutions in respect to land and property markets

There is a lot written about what really constitutes an institution. However, there is not one accepted definition of an institution. In order to explain this concept Douglas North²⁶ (1990 p.3) should be quoted here to begin with:

“Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.”

In the North (1990 p.3-5) sense “*constraints that human beings impose on themselves*” or “*structure incentives in human exchange*” includes rules and norms that constrain human behaviour. These rules and norms refer to formal law and regulations, informal or customary rules, cultural norms or standards of behaviour. North (1990 p.4) distinguished between formal and informal rules, which create the framework within which individuals operate. The institutional framework can prohibit one from doing something or impose the conditions for undertaking certain activities.

“Institutions are made up of formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g. norms of behaviour, conventions, self-imposed codes of conduct), and their enforcement characteristics.” (North, 1996, p.334)

North (1990 p.7) also distinguished between institutions and organisations. Organisations can use institutions and modify them. However, mutual influence exists between institutions and organisations:

“Institutions, together with the standard constraints of economic theory, determine the opportunities in a society. Organisations are created to take advantage of those opportunities, and, as the organisations evolve, they alter the institutions”.

²⁶ Douglas C. North is the main contributor to Institutional Economics and received a Nobel Prize (together with Robert Fogel) in 1993. In his book in 1990 he used the metaphor of a football game. The actors in the market are considered the football players and the institutions are the rules that structure the game.

Elinor Ostrom (1990, p.51) defined institutions as: *“the set of working rules that are used to determine who is eligible to make decisions in some arena, what actions are allowed or constrained, what aggregation rules will be used, what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned to individuals dependent on their action. All rules contain prescriptions that forbid, permit or require some action or outcome”*. Ostrom also distinguished between formal law and working rules. She also realized that all rules are nested in another set of rules at several levels that define how the first set of rules can be changed. She distinguished three different levels of rules: operational rules (directly affect the day-to-day decisions), collective-choice rules and constitutional-choice rules. This led to the conclusion, that institutions should be analyzed at different mutually connected levels. For policy makers aiming to reform any institutional set-ups the existence of different levels of institutions with different time horizons of change should be studied carefully (see also Williamson 2000, Jütting 2003).

In relation to urban studies, definitions of institutions follow the general debate in economics. Salet (2000) defined the rules or arrangements, which constrain and facilitate the functioning of the market in one of three broad types:

- (1) *“informal social rules dependent on cultural factors, belief systems, values (these might involve agency relationships and overlap the behavioural factors) ...*
- (2) *formal rules of regimes, specifically designed*
- (3) *institutional reflection in practise; divergent behaviour types... ”*

Therefore when applying the institutional thinking into land and property markets the differences between formal and informal institutions shall also be emphasised. The formal rule can change overnight. However, the informal rules as customs, traditions, and codes of behaviour are much more difficult to change. *“Although formal rules may change overnight as the result of political or judicial decisions, informal constraints embodied in customs, traditions and codes of conduct are much more impervious to deliberate policies”* (North 1990 p.6). *“Changes in the rules used to order action at one level occur within a currently “fixed” set of rules at a deeper level, changes in deeper-level rules usually are more difficult and more costly to accomplish, thus increasing the stability of mutual expectations among individuals interacting according to a set of rules”* (Ostrom 1990, p.52). The importance of informal institutions as a key element in understanding of studied phenomena is emphasised also by Jütting (2003). It is nowadays commonly accepted that formal and informal institutions should be seen as complementary. Informal institutions can build the background for introducing formal rules (Brautigam 1998). Platteau (2002) comes to the conclusion that in certain circumstances the informal institutions reduce transaction costs, secure more equal distribution of land access and are also widely recognised and accepted.

The same line is followed by Needham & Louw (2006) who defined the institutions with respect to land market. They referred to the institutions in the North sense (distinguishing between rules and actors) and include:

“...formal rules as the legal definitions of rights in landed property and how those are protected, requirements for registering property, taxes on property and on property transfers, restrictions on the use of land imposed by planning and other laws, rules for compulsory purchase and the compensation that has to be paid. There are also informal

institutions in the land market, such as the weight that is given to unwritten agreements, the expectations about the part played by public and private organisations, trust and how that affects the use of networks. The intangibility of that which is exchanged in land markets (namely property rights), the high monetary value of those rights, and the great significance of land for individuals and their society, mean that institutions are particularly important for land markets.”

Therefore institutionalism sees human behaviour as driven by different kinds of rules, like habit or routine, as well as rules about the interaction in and entry to the market²⁷. In the approach of North the organisations and persons were considered as actors (North 1990 p.7, see also Sevatdal 1999). However, the definition of institutions has been extended to include also organisational entities, procedural devices, and regulatory frameworks (Van der Krabben, 1995, Williamson, 2000) and also markets (Hodgson, 2004 p.44).

It is useful to summarise the first part of the discussion by presenting an overview of the various ways in which institutions can be understood (Table 1.). For instance Jütting (2003) regrouped ways of classifying institutions into three approaches depending on: the degree of formality, different levels of hierarchy, and the area of analysis.

Table. 1. Classification of institutions. Source: Author’s presentation of various ways of classifying institutions based on Jütting (2003)

Classification criteria of institutions	Categories	Examples	Comments from empirical study on evidence of impact of institutions on development outcome
The degree of formality	Formal	Constitutions, laws, property rights, charters, bylaws, statute and common law, regulations	Informal institutions are more important in poor countries where formal institutions are less developed. They substitute for formal institutions. The same formal rules and constraints imposed on different societies produce different outcomes. Informal rules are more difficult to change.
	Informal	Extensions, elaborations, and modifications of formal rules, socially sanctioned norms of behaviour (customs, taboos and traditions) and internally enforced standards of conduct	

²⁷ In the heart of the institutionalist conception of social life is the Giddens’s theory of structuration (see Healey, 1997, p.47)

Different levels of hierarchy	Level 1 - Institutions related to the social structure of the society	Mainly informal institutions such as traditions, social norms, customs. Exogenous. Very long horizon of frequency of change but some may change also in times of shock/crisis	Define the way a society conducts/regulates itself. Date back many centuries. The most important level for people in developing countries. The path of change is rather slow or even non-existent. Religion and basic conception of the reality.
	Level 2 - Institutions related to rules of the game	Mainly formal rules defining property rights and the judiciary system. Exogenous or endogenous. Long horizon (10 to 1000 years).	Define the overall institutional environment
	Level 3 - Institutions related to the play of the game	Rules defining the governance, private structure of a country and contractual relationships, e.g. business contracts, ordering. Endogenous. Mid-term horizon (1 to 10 years)	Lead to the building of organisations
	Level 4 - Institutions related to the allocation mechanisms	Rules related to resource allocation, e.g. capital flow controls, trade flow regimes, social security systems. Endogenous. Short-term horizon and continuous.	Adjustment to prices and outputs, incentive alignments. These rules are easy to change and they have an impact on resource allocation, employment, the social security system, etc.
The area of analysis	Economic institutions	Rules related to production, allocation and distribution process of goods, services, and markets	
	Political institutions	Rules related to elections, electoral rules, type of political system, etc.	There is emerging literature that looks at the effect of how political institutions affect economic policy
	Legal institutions	Rules related to type of legal system, definition and enforcement of property rights	
	Social institutions	Rules related to health and education and social security arrangements	

A first alternative to classifying institutions is to distinguish between formal and informal rules and constraints. A second alternative of classification is based on ideas of Williamson

(2000), who proposed that classification is based on different levels of hierarchy. He described institutions related to the social structure of the society (level 1), institutions related to the rules of the game (level 2), institutions related to the play of the game (level 3) and institutions related to the allocation mechanisms (level 4). It is assumed that different levels are interconnected in such a way that the higher-level institutions impose constraints on the lower levels, on the other hand the lower level institutions in turn exert a certain influence on the higher levels. This definition is consistent with the point of view of Ostrom (1990). The various channels of influence are however not always clear. First level institutions are seen as exogenous to the economic system. This means that they are coming from outside an economic system. Second level institutions, which contain mostly formal institutions, define and enforce property rights. Third level institutions relate to governance. The fourth level of institutions determines the resource allocation mechanisms. Institutions from the levels 2 to 4 are usually endogenous to the economic system, generated therefore within the system. Jütting (2003) pointed out that *“while endogenous institutions can be changed within a relative short time span, the change of exogenous institutions like informal rules, social norms, and customs might take a very long time or is even impossible”*. The third way of classifying institutions takes into consideration various areas of analysis. (Jütting 2003)²⁸

2.2 Institutional models. Different approaches to the study of institutions in property research

‘The institution matter’, but what is the role of institutions in development outcome? In general international debate on development, the empirical study on the impact of institutions on the development outcome (measured for example in growth rates) proves a strong positive correlation between quality of institutions and development outcome²⁹. In the literature of the 1990s concerning cross-country studies, institutional quality was measured by variables such as political violence and civil liberties. Recently, institutional measures refer to the risk of expropriation, degree of corruption, quality of bureaucracy and strength of the rule of law. (Jütting 2003)

In the general development debate there is a lack of precise indicators to measure the impact of institutions on the development outcome and the evidence of causation. This was emphasized, for example, by Chang (2006) in relation to the property rights system:

“Giving the impossibility of aggregating all elements of a property rights system into a single measurable indicator, empirical studies tend to rely on subjective measures of the overall ‘quality’ of the overall property rights system. Many rely on surveys among (especially foreign) businessman, ‘experts’ (e.g. academic, chief economists of main banks and firms, etc.), or even the general public, asking them how they assess the business environment in general, and the quality of property rights institutions in particular (...) these kinds of measures are very problematic”.

²⁸ Jütting (2003) argues that the second alternative of classifying institutions is a better way to understand institutional changes and the impact of institutions on outcome.

²⁹ This finding is based mainly on the cross-country studies. However, there is still a critique concerning the conceptual problems and the evidence of causation. There are also other factors like geography and trade that are taken into consideration vis-à-vis institutions (see for instance Sachs 2003).

In studies of institutions in land and property market, an impact of the institutional and regulatory environment on land and property market and processes have been confirmed by several researchers (e.g. Haila 1990, Van der Krabben, 1995, Kauko 2002). Therefore, the institutional components have been added as a variable in analysis in the property research area. For example Kauko (2002) incorporated institutional (as well as behavioural and cultural) aspects into the conceptual urban property value model. In this way he extended his framework of analysis beyond the neoclassical economic assumption. However, there are also conceptual problems concerning the scope and definition of institutions as well as evidence of causation. Several different approaches to study institutions in relation to land and property market were proposed (see for instance the review of institutional approaches of Ball 1998).

Attention to process which changes the urban spatial structure was first paid by Ball (1986) and Healey and Barret (1990). Earlier models conceptualise the property development process and theorise the relation between the groups of actors that are involved in this process. The attention was directed towards research agenda, consisting of four themes of inquiry:

- (1) The review of the changing forms of capital flow into and out of the built environment requires an understanding of the diverse sources of capital, the different ways capital can be invested in property and the place of property in the investment strategies of different kinds of firms.*
- (2) The changing composition and strategies of the firms involved in the development and redevelopment of the built environment need to be explored. The emphasis would be on the way changing strategies reconstitute the interests firms have in land, property and property redevelopment and the way these interests find reflection in the negotiative practises through which action is undertaken*
- (3) The various ways in which the state impinges on these changing practices, in relation to the tools of intervention employed, the way in which these affect the demand for space, the rules within which individual firms develop their strategies, and the forms of development process, should be examined.*
- (4) Research must be directed to an assessment of the implication of the above processes for local economies in terms of capital flows, labour market demand and supply, building materials and land, the impact on land and property values, and the implications of changes for these, the resultant social, economic and environmental externality costs and benefits within local economies and the distribution of these. (Healey and Barrett, 1990, p.98-99)*

Healey (1992) followed this line of argument by enumerating a number of issues that are relevant to the above themes:

- (1) The significance of spatial variations: in land and property markets, development activity, in institutional relations, and the potential and actual effects of urban policy (...);*
- (2) The significance of temporal variation and specifically the impact of the cyclicity of property development activity (...);*
- (3) The interplay between changes in land and property markets, development industry relationship, and the user and investor needs and demands of the changing city (...);*
- (4) The distribution of costs and benefits from development activity (...);*

- (5) *The interplay of the specific history and geography of particular urban regions, and the effort of locally based initiatives, the localizing forces, and the globalizing tendencies of corporate conglomerates and oligopolistic relations, international political initiatives* (Healey, 1992, p.10-11)

For instance, Healey (1992, p.33) in order to generalise about rules and relations involved in the property development process proposed a descriptive institutional model of the development process, which contains four levels of analysis:

- (i) *“a description of the events which constitute the process, and the agencies which undertake them*
- (ii) *identification of the roles played in the process and the power relations between them*
- (iii) *an assessment of the strategies and interests which shape these roles, and the way these are shaped by resources, rules and ideas, and*
- (iv) *the relation between these resources, rules and ideas and the wider society”*

This approach is called “*structure-agency institutionalism*” (Ball 1998). Structure-agency analysis pays attention to the process of land and property development by investigating the relationships between structure and agency - what drives the process and in what way individual agents develop and pursue their strategies. Structure is established by the way agents operate and is composed of various rules that govern their behaviour, and the ideas which they drawn upon in developing their strategies (Healey and Barrett 1990).

Healey’s model focuses on distinguishing levels of analysis rather than placing the analytical emphasis on typologies of actors, events and interest. This particular institutional model received some methodological criticism (see below the critic of Ball 1998). However, it was also used in property research and other authors saw it as an appropriate methodology (see for example Van der Krabben and Lambooy, 1993, Van der Krabben, 1996). In general Healey’s model is popular in the planning research field. For example recently in Finland it was used as a research approach in international comparative research of Kurunmäki (2005). There are, however, a lot of different approaches popular in the property research field.

Ball (1998) explores the differences that exist between methodological approaches to the study of institutions in the British property research. According to him, the approaches used in studying institutions range from mainstream economic theories to structure-agency approaches which are represented above in Healey’s model to power approach and structure of provision approach. The borders between different approaches, however, are not so clear (see Tab.2).

Table 2. Approaches to the study of institutions in British property research. Source: Author's presentation based on Ball (1998)

Institutional analysis in British Property Research			
Methodological perspective	approach	Related theories	Characteristics
Mainstream economics (Neo-classical economics)		Technical Production Characteristic	Studies of economies of scale.
		Transaction-cost Minimising	Institutions and their organisational structures evolve to minimise the transaction cost associated with production and exchange
		Game Theory	Investing strategic behaviour in the context of predefined situations and rules of behaviour. The prisoners' dilemma.
		Information Theory	Information is necessary for any economic activity, but it is also bounded. No-one knows the future and cannot expect to have more than a limited range of expertise.
Power Approaches (Behavioural theories)		General ad hoc Institutional Analysis	No clear theory of institutions and how to study them. Rather elements are drawn together in ad hoc explanation. The histories of property developers.
		Conflict Institutionalism	Identify groups to be in conflict and their interests. Like local interest versus private developers. Wider city and national interest is ignored in this research.
		Behavioural Institutionalism	Identify the behavioural characteristics of a particular type of agency – landowner, developer or financier
Structure-agency theories		ASH (Agency-Structure Healey) type of research	Four level framework for analysis of Healey
Structures of provision		SoP – Structures of building provision - Ball	Proposed by Ball. Refers to the contemporary network of relationships associated with the provision of particular types of building at specific points in time.

A number of specific institutionally related theories in economics can be distinguished. They have been applied to property research, including transaction cost theory, game theory and information theory. However, according to Ball (1998) the second approach – namely the power approach to institutions, was the predominant approach, at least within British property research. First, I will discuss the various approaches, especially the most popular Healey's institutional model of development process and then I will direct attention to the economic approach to study institutions.

The *power approach* means identifying ad hoc institutional power and its consequences. The weakest approach according to Ball (1998) of the power approaches is called “*general ad hoc institutional analysis*” (also called “*ad hoc institutionalism*”). Within such an approach “*there is no clear theory of institutions and how to study them, rather elements are drawn together in ad hoc explanations*”. The action of individuals is also emphasised over markets. Another type of research called by Ball “*conflict institutionalism*” focuses on conflict studies between public and private parties involved in the process, mainly local community and private developers. In turn “*behavioural institutionalism*” identifies the behavioural characteristics of a particular type of agency. Agency is a term understood for example as landowner, developer or financier. The “*structure-agency institutionalism*” type of research, as criticized by Ball is not different from the ad hoc institutionalism. Critics are concerned by the lack of definition, what really constitutes the structure, agency or institutions and the relevance in the local practical context (Ball 1998). The structure of building provision approach³⁰ “*refers to the contemporary network of relationships associated with the provision of particular types of building at specific points in time. Those relationships are embodied within the organisations associated with that type of building provision, and they may take a market or a non-market form. Provision encompasses the whole gamut of development, construction, ownership and use*” (Ball 1998). The difference between this approach and the approach proposed by Healey (1992) lies in the understanding of structure. In Ball’s approach, the organisation and markets are included in the structure of building provision because of the mutual influence on each other. The other elements are constraints and rules under which they operate. All these elements together with historically specific institutional and other social relations create unique structures of provision (SoP). Several SoPs may also exist for one type of building provision at certain moments of time. This according to Ball provides an understanding of why there is no one universal explanation of the development process as it was assumed by other models and authors. Healey’s approach – the “*structure-agency institutionalism*” - was followed by a remarkable amount of contributions. However, for example Van der Krabben (1995, p.64) criticized Healey’s model:

“In Healey’s model the social relations ‘which constitute the strategies and interests of actors, and the resources, rules and ideas available to them’ are theorized. This theoretical framework makes it possible to explain why in an international context development process differs in form and why there are temporal variations with respect to property development. However, it essentially leaves unravelled the economic and non-economic reason underlying the actor’s strategies. Economic action is, moreover, deeply influenced by information problems that should therefore be allotted a central place in the theoretical framework. Finally, it does not theorize the dynamics behind institutional change – why does institutional change take place? – though it certainly recognizes the temporal variation with respect to the institutional context. In essence, Healey’s institutional model of the development process theorizes the relation between the institutional context and the property development process. However, it does not enter into the institutional context itself – (the emergence of) the particular institutional organization of a local or national real estate market is not explicitly theorized – and, furthermore, it does not theorize human behaviour – the strategies of the agents involved in the property development process.”

³⁰ This approach to institutionalism was developed by Ball by himself. Initially it was formulated as part of research concerning housing and then applicable to wider interpretations.

Van der Krabben (1995, p.44-45) took a step further in theorizing about the institutions in the built environment and distinguished between institutional theory (those of Healey's) and the institutional-economics theory³¹. He argues that the institutional theory concentrates on the conditioning of decisions by institutional arrangements, regulation and the influence of power on the functioning of markets. The focus is on the way, in which different groups of actors and organizations that participate in urban development processes relate to each other and to other sectors of the local economy and to regional, national and international financial and development interests. The most important starting point is the heterogeneity of the market – both heterogeneous groups of individual actors and organizations operate on the market. In addition, the institutional theory recognizes the importance of relative power – not only between labour and capital – and the importance of cultural and institutional differences and the position of organizations. Therefore three main themes of enquiry are central to the institutional approach:

- (1) the identification of agents and institutions involved in urban development processes, their different goals, ideologies and relative power;*
- (2) the nature of interaction between these diverse agents and institutions and the kinds of constraints they impose on each other;*
- (3) the effect of this interaction on the development process (Basset and Short 1980)*

On the other hand the institutional economics paradigm concentrates on making theories about the motivations of actors rather than taking them as given, as in neo-classical economics, as Bovaird (1993, p.641) puts it: *“In the production sphere, it theorizes ways in which economic decisions have been made and co-ordinated, both within firms (...), between firms (in sub-contracting relationships and other networking approaches) and between the public and private sectors (in the public-private partnerships, corporatist boosterism, etc”*.

Van der Krabben (1995, p.44-45) argues that institutional economics consists of a collection of sub-approaches, of which the transaction cost approach (new institutional economics) is perhaps the most prominent one. Van der Krabben (1995) in his book “Urban Dynamics: A Real Estate Perspective. An institutional analysis of the production of the built environment” proposed a framework for an institutional-economic analysis of property development. He further said that (p.64-65): *“Economic theory can then be used to make explicit the assumptions underlying the model and to theorize the institutional dynamics of the local or national economy and the economic actions of the individual agents.”*

In my research I will follow the economic approach to institutions. Therefore I will include the additional sub-approaches from economic theory to study institutions. My chosen sub-approach will be the property rights theory. The research problem could be discussed using different languages, for example using the vocabulary of political science. In this research the economic language was chosen as the language of discussion. Before discussing the land development models based on the institutional-economics approach (model of Van der Krabben, 1995), and explaining what is the difference in my research, I will explain the general theory of economic approach to study institutions (new institutional economics).

³¹ The institutional economics can be seen also as institutional theory like for instance sociological institutionalism. However, I decided to follow the distinction made by Van der Krabben, because it allows for building a more precise line between elements of institutions and elements of economics within an analysis.

Economic thinking has developed since the time of Pareto (1843-1923) and Pigou (1877-1959), who were discussed in Chapter One. It is worth discussing the fundamental changes in the economic approach. Then I will come back to the land development models and discuss Van der Krabben's model and present my perspective that has been chosen in the present study.

2.3 Economic approach to institutions. Institutional-economic theory

The institutional economics focus is on the understanding of the effects of institutions in shaping economic behaviour. Economic behaviour is understood as a system of human activities related to the production, distribution, exchange, and consumption of goods and services. In this study this activity will refer to changes of the built environment in the form of different land development processes. Economic-institutional thinking can be explained by referring to land price issues, how Van der Krabben (1995) puts it: *"when land prices suddenly increase, it should be investigated whether this rise is the result of a suddenly growing demand for building land or whether institutional changes are responsible for the change in land prices"*

As already stated economic thinking has developed since the time of Pareto (1843-1923) and Pigou (1877-1959). New institutional economists noticed that transactions are not without frictions, and institutions, like property rights, do matter. *"If information is not perfectly distributed and transaction costs are not zero, then the outcome for any externality problem depends on the distribution of property rights"* (Webster & Lai, 2003, p.173.) Coase, Williamson, Alchian & Demsetz revised the neoclassical approach because they were not satisfied with the assumption of a perfectly competitive market with full information and zero transaction costs³². Lai (2005) regards this as one of the most important schools of "non-orthodox" economic thought that:

"... has developed a language, a way of thinking, and a set of analytical tools that help explain the significance of and reasons for the existence of the price mechanism and private property as an institutional alternative and complement to non-market means of transactions and joint consumption in a society"

The attention to transaction costs as well as property rights was elucidated in Coase's famous "The Problem of Social Costs" (1960), which emphasised that when it is costly to transact institutions (property rights) matter. Coase³³ came to the conclusion that if transaction costs are kept low, voluntary agreements will result in a more sensible distribution of costs that can law, rules or regulations. The famous Coase Theorem pointed:

"When rights are well defined and the cost of transacting is zero, resource allocation is efficient and independent of the pattern of ownership" (Coase, 1960)

³² Neoclassical economics discussed only the cost of production. The transaction costs include: *"the cost of competition, information, measurement, contract formation and contract enforcement under a specific institutional arrangement"* (Lai, 2005)

³³ Coase used an example the sparks from trains that burn farmland. Recently, explanations of Coase's work have been elaborated by Lai (2007).

This implies that, in the absence of transaction costs, all initial allocations of property rights are equally efficient, because the interested parties will negotiate to correct eventual externalities. However, in real life the transaction cost cannot be neglected and therefore the initial allocation of property rights affect what happens with respect to externalities. Institutional economic theory originated from a growing dissatisfaction with the explanatory power and the lack of reality in neo-classical economic theory. The neo-classical economics theory was criticized on three main points:

- (1) Ideas concerning rationality (the economic agents are assumed to show rational, maximizing behaviour, whereby their preferences are exogenously given)
- (2) Ideas concerning knowledge (chronic information problems are believed to be absent)
- (3) The economic process and the human agents (the theory focuses on movements towards or attained equilibrium states of rest, rather than on the continuous processes of transformation through historical time (Hodgson, 1988, p.XIV)

The new institutional economics theory pointed to the significance of the institutions and the transaction costs as well as of the fact that human beings are bounded rational (the knowledge of the decision maker is severely limited) and in addition sometimes display opportunistic behaviour. Because of these two aspects of human behaviour the uncertainty in explaining human actions arises. (Hodgson, 1988, 1993)

In the welfare economics approach, the government intervenes in the market to restrain the externality problem on one interested party, but Coase paid attention to a reciprocal nature of the problem: by restraining one party, the other party can be harmed. Coase refers to externalities as 'social costs'. Regarding the way externalities should be treated, he states: *"The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how we should restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would be to inflict harm on A. The real question that has to be decided is, should A be allowed to harm B or should B be allowed to harm A?"* (Coase, 1960). Needham (2006 p.60) explains this by referring to the example of a 'smoking factory chimney': *"Suppose the 'initial delimitation' is that the factory has the right to produce filthy smoke: but that it is prepared to produce less, or none, if compensated by the residents who want clean air. Now suppose instead that the 'initial delimitation' is that the residents have the right to clean air: but that they are prepared to accept polluted air if compensated by the factory, which finds it profitable to emit filthy smoke"*.

According to new institutional economists, externalities should not be seen as a ground for government intervention. New institutional economists point out that market failures do not exist (Buitelaar, 2002). They indicate that if there is a problem of externalities the property rights are not adequately specified. Therefore a particular way in which the rights are allocated between the parties is important for the economic outcome. Buitelaar (2004) explained the approach of new institutional economics to delivering the services on land and property market in the following way:

"Welfare, or Pigovian, economists would often say that the market will not supply such goods, like road infrastructure. Neo-institutional economists argue that market failures do not exist. When the market does not supply goods like road infrastructure it is the property rights that are incompletely assigned and the transaction costs that are positive."

Also according to Sorensen (1994) welfare economics planners have used the concept of externalities and market failures somewhat uncritically to justify government interventions in the form of public land use planning³⁴. Buitelaar (2002) has summarized the following:

“To the Coasian planners it cannot be assumed that the separation of different land uses, for example, automatically leads to socially advantageous results in terms of the abolition of externalities and, even if it would, it cannot be assumed that the government is able to manage that ideally. They challenge the welfare economists’ implicit assumption of an imperfect market allocation versus a perfect administrative process of allocation. This assumption suggests that planning is without costs, which is obviously not and also that a public body is always able to find and apply the best correction”.

The difference between neoclassical theory and the new institutional economics lies in the treatment of externalities. In neoclassical economics externalities are eliminated by intervention, for example in the form of planning control. Coase’s (1960 p.131) solution was: *“It is all a question of weighing up the gains that accrue from eliminating these harmful effects against the gains that accrue from allowing them to continue”*. According to the new institutional economics the externalities and public goods are considered to be problems of undeveloped markets/ institutions: *“they arise when resources have a value, but are ill-defined in terms of property rights and as a result of proprietary ambiguity remain unpriced and inefficiently allocated”* (Webster and Lai, 2003, p.99)

The importance of institutions, to which the neoclassical approach gives little attention, received already in the early part of the last century attention from representatives of the traditional, old institutionalism³⁵. The most famous representatives of the old institutionalism are Thorstein Veblen, Wesley Clair Mitchell, Gunnar Myrdal, Clarence Edwin Ayres and John Commons (Lai, 2005). The representatives of modern institutionalism are collectively referred to as the new institutional economists³⁶. (Adams *et al.* 2005, Webster and Lai, 2003, Webster, 2005)

³⁴ The perspective of R.H. Coase (named also after his name the Coase solution to externalities) assumes that landowners affected by externalities negotiate a contract to solve the externality problem. O’Sullivan (2003, p.245) argues for example based on the experience in the city of Houston that in the absence of zoning, the neighbourhood externalities are large enough to justify the cost of developing and enforcing restrictive covenants. Observations from Houston can lead to the conclusion that in the absence of zoning it is unlikely that incompatible land uses would invade each other. O’Sullivan (2003, p.245)

³⁵ For the explanation of difference between old institutionalism and new institutional economics see for example Buitelaar, 2007, p.15-17 or Lai, 2005, p.9

³⁶ New institutional economics focuses on the understanding of the effects of institutions in shaping economic behaviour. New institutional economics is not one unified theoretical approach but a pluralistic family of approaches. It can be divided into three different approaches (Buitelaar, 2002): 1. the property rights theory, 2. the transaction cost theory, and 3. the agency theory (the principal-agent theory). However, this distinction is only analytical because in all the approaches, property rights and transaction costs play a central role. Buitelaar (2002) argues that not every approach is useful for application to that part of spatial planning that deals with land development: *“The agency theory, for example, has little relevance for the analysis of land development process. But the property rights theory in combination with the transaction costs theory might be valuable, despite some shortcomings, like limited explanatory potential of the rationale behind government planning.”* See also Kim and Mahoney (2005) and Furuboth and Richter (1991) for the explanation of the fundamental theoretical principles derived from these three theories.

The perspective of the new institutional economics (the ideas of Coase) for the planning versus government debate in land use planning, first found its expression mainly in an American context³⁷. In Europe it was applied as an argument for less public involvement in planning especially in Britain during Thatcherism (see Thornley 1991). State of the art of the institutional-economic theory was reviewed in 1995 by Erwin van der Krabben (1995, p.67-83). He, following Hodgson (1988) criticized the new institutional economics theory from a socio-economic point of view (see also Van der Krabben, 1995, p.78-79 for the summary of Hodgson's interpretation of the functioning of markets and the role of institutions). Van der Krabben (1995, p.45-46) pointed out that till 1995 the contributions in the field of institutional economics – when applied to urban economies – have paid attention almost exclusively to decisions of firms and the way this influences urban economies. These studies analyse why firms move to other regions, analyse the economic relations between firms in a specific region, and investigate the factors underlying the success of a few regions that show larger economic growth than other urban regions. Recently the ideas of Coase have come once again into light as arguments for less public land-use planning (e.g., Corkindale, 1998, Pennington, 2002). According to the planning literature, the impact of new-institutional economics started to be evident at the beginning of 2000 (see writings enumerated in Lai, 2005). However, still it is not the dominant trend in the urban research agenda. Buitelaar (2002) argued that only few scholars have explored the implications of the new institutional economic approach for planning and development issues. He listed Alexander, Fischel, Heikkila, Lai, Pennington, Poulton, Sorensen and Webster.

In recent years, much attention has been directed to the relationship between new institutional economics and land and property markets (Lai 2005; Needham & Louw, 2006; Needham 2006; Buitelaar 2007, Van der Krabben, 2009). Buitelaar (2007) discussed these relationships between institutions and transactions costs in land development. Needham (2006) reviewed the property rights approach to land use planning issues. Recently the journal *Town Planning Review* (2007) also dedicated a special issue to the property rights approach in land use planning. In my research I will follow this still emerging trend of application to the land development issues, the perspective of the new institutional economics.

2.4 The model of the development process based on the institutional-economic theory

A summary of the pros and cons of the models of the development process based on neo-classical and institutional theory can be found for instance in Van der Krabben (1995, p.49). He argued that the way to extend our knowledge of urban dynamics is to concentrate on actual land and building development processes and to analyze the strategies of the group of actors that are involved in property development. Therefore as he puts it: *“the organization of the property development industry, the rules, ownership rights and the institutional relations between the developers, financial institutions, real estate investment companies, building construction companies, real estate agents, etc. have to be investigated.”* Van der Krabben has focused on the influence of the institutional organization of the market on real estate development and provided both theoretical explanations and empirical evidence for the

³⁷ Webster (1998, p. 54) for example argue that it is due to the fact that planning academics in Europe have a preference for a holistic view of planning as urban and regional management, rather than regarding planning as land policy.

hypothesis that, apart from the nature of demand and supply in a local real estate market, the institutional organization of that market plays a significant role with respect to the outcome of real estate market processes. The institutional organization of the real estate market includes, in particular, the organization of the development industry, the strategies of the 'property developers' and the institutional relations between the actors that are involved in this industry, property ownership, (active) government intervention and regulation. These are vital parameters with respect to the explanations for the variations in the real estate market. In addition he has also examined the role of uncertainty or incomplete information in market processes, because many market processes are influenced by the degree of uncertainty, like for instance, how the uncertainty with respect to future returns of commercial real estate investment influences the developers' decisions on the development of new real estate projects (Van der Krabben, 1995, p.18). In summary the framework for analysis based on the institutional-economic theory developed by Van der Krabben directed attention to four main issues: the meanings of information problems, or uncertainty on economic life, the rationalities behind the strategies of market participants, institutional change, and the meaning of path dependency. These four issues are the economical variables, which have according to Van der Krabben explanatory power and differentiate his analysis from the institutional analysis of Healey (1992). Empirically he analysed for example the functioning of the housing market in the Netherlands. He related the production of new dwellings (roughly between 1970 and 1995), to, among other things, the organisational structure of the real estate development industry, government intervention, the functioning of the second-hand owner-occupied housing market, trends in production costs, development gains and the profitability of speculative housing development, and the spatial structure of Dutch cities. He investigated the relationship between the 'structure of house building provision' that is typical to the Dutch situation and (the outcome of) development processes on the housing market. Moreover, he also analysed the institutional changes that have taken place in the Dutch housing market and the sources of these institutional changes.

Van der Krabben (1995) has addressed a wide number of issues that are of course important in the debates on the real estate market. He paid attention to new aspects that have been ignored in Healey's approach, like institutional change, path dependency, information problem, and the rationalities behind the strategies of market participants and proved that these factors matter in the functioning of the real estate market. Although, the research of Van der Krabben provides valuable analysis, some variables can be criticized. For instance, the behavioural aspects are difficult to be defended as explanatory variables. The uncertainty in explaining human actions arises not only because human beings are 'bounded rational' (the knowledge of the decision maker is severely limited) and in addition sometimes display opportunistic behaviour. In addition, in human behaviour there are always elements that are irrational, destructive and unpredictable. We learn and grow, also by our mistakes, all the time and become complex human beings. Therefore, no characteristic can build borders for unpredictable behaviour of human actors. What is also missing in Van der Krabben's (1995) research is the emphasis on the formal rules and property rights distribution, which can direct the development outcome and which I would like to emphasise in the present study.

2.5 Conclusion of institutional and institutional-economic theories

Institutional theory as opposed to the neo-classical and Marxist theories pays attention to market processes, which are important for the research aiming to study the land development processes. It gives the theoretical foundation on the existence of relation between actors, processes, rules, their formation, operation and path dependence. Therefore, the institutional approach helps to understand the complexity of urban land markets. Institutions can be analysed at different levels of conceptualisation. Following North (1990) it can be both formal and informal rules (called also conventions). Formal rules can also be subdivided into several level of analysis (Williamson, 2000), which concerns different legal rules of the functioning of the market. It is evident from the criticism of Ball (1998) that there are different classifications or delimitations of institutional approaches. There is no one widely accepted definition of institution. In the North (1990) sense we can distinguish between institutions and organisations, but other authors following Williamson and Van der Krabben add the organisations and markets within the scope of institutions. Therefore still there is an open debate around which types of rules are in general the most crucial?

The institutional approaches to study institutions include i.e.: the power approach, the structure-agency institutionalism, and the structure of provision approach. When some sub-approaches, which explain from the economic perspective the results of the development process, are incorporated into the analysis, we speak about the economic-institutional models of land development. The institutional approaches and the economic-institutional approaches are respectively also named 'old' institutional theories and new institutional economics. The economic approaches to study institutions are very complex in their scope. The new institutional economics is not a unified approach. Therefore models based on the new institutional economics are also using different theories to explain the appearance and changes in institutional environment itself and the outcome of the built environment.

2.6 Further reasoning for the scope of the research

The current approaches incorporate several factors as an explanatory variable and tend to focus on the relationship between actors involved in the process. For instance, Geuting (2007) pointed out that current institutional models of land development focus on the diversity of the events and agencies (also called actors) or involve the analysis between structures (both formal and informal) and agency. She continues that many of these models emphasized a process of interaction between structure and agency, paying much attention to the operation of agents.

As human behaviour contains always unpredictable elements, which causes uncertainty I have decided to focus (following for instance Pryke and Lee, 1995, Tiesdell and Allmendinger, 2005, Geuting 2007) on the formal rules, which build the framework within which the market functions.

The human characteristic of agents (called also actors or organizations) and/or (using different terms) the relationship between structure and agency (or stakeholders) also directs the development outcome and it is considered as a significant variable in land development. The market agents always have room for their decision and they can widely influence the land

development process. In addition all rules are socially created. However, motives and choices of agencies involved in the process, although are considered significant, will also be left away in this study from the scope of the research³⁸. The focus in present research is on inverse relation, i.e. how formal arrangements influence the practice for land development. What is the room for market agents within the formal framework? Therefore attention will be paid to property rights theory and the rules, which constitute the property rights regime (the concept will be explained in more detail in the following chapter) in land development process. Apart from the nature of demand and supply in a local real estate market and the institutional organization of the market, new elements will be added to the discussion.

In this research it is assumed that when doing an examination of the influence of particular institutional set-up, it is theoretically needed to exclude all other levels of analysis. Other levels of analysis are considered significant. However, they are known and unchanging and theoretically fixed for the purpose of the research on the selected level. The institutional analysis is so complex in nature that it is worth concentrating on one institutional level of analysis, e.g. property rights regime. This kind of approach enables to further step into the study of institutions. Application of the outcome of analysis of one particular level can help further to find the mutual connection to different levels of institutions³⁹.

In two following chapters attention will be paid to property rights theory and the rules, which constitute the property rights regime in land development process.

³⁸ Also the explanatory variables discussed theoretically and empirically by Van der Krabben (1995) will be left out from the scope of the research.

³⁹ The analysis of institutions at selected levels could be seen difficult because in practice these theoretically fixed rules are subject to change over time and are mutually connected with the other levels of institutions. For example, Ostrom (1990, p.50) points that: *“The rules affecting operational choice are made within a set of collective-choice rules that are themselves made within a set of constitutional-choice rules. The constitutional-choice rules for a micro-setting are affected by collective-choice and constitutional-choice rules for larger jurisdictions”*. Therefore it is difficult to build precise boundaries between different levels of institutional analysis. Sometimes it is needed to go behind the scope of research. However, besides the criticism Ostrom also envisaged the distinguishing levels of institutional analysis as a most promising research method (see also Jutting, 2003).

Chapter Three

PROPERTY RIGHTS THEORY

From the scope of the institutional-economic analysis, further attention is directed to the formal rules and to the property rights theory. This chapter provides an outline of current thinking in regard to the property rights theory by presenting the assumptions of property rights, the notion and deconstruction of property rights, the role of transactions costs, and political power in the interpretations of the evolutionary character of property rights. Finally, this chapter explains how property rights theory can be applied to planning and development issues. This chapter also includes a discussion on how to improve market efficiency based on the property rights theory. This discussion contains e.g. the approach of ‘spontaneous’ versus ‘planned order’ (Webster and Lai, 2003), the approach of ‘structuring’ versus ‘regulating’ the market (Needham, 2006), and ‘the compensation rules’ by Van der Krabben (2009).

This chapter aims to identify the curtail elements in the property rights theory, which can be used in further discussion on influence of the property rights regime on land development processes. In this chapter the concept of the property rights regime is elaborated.

3.1 Introduction to property rights theory. How property rights emerge?

The foundation of the study of property rights (and transaction costs) rests in the Coase Theorem as discussed in Chapter Two: *“When rights are well defined and the cost of transacting is zero, resource allocation is efficient and independent of the pattern of ownership”* (Coase, 1960). The foundation for the property rights theory was also formed by Alchian (1965, 1969), Demsetz (1964, 1966, 1967), Alchian and Demsetz (1972, 1973), Cheung (1968, 1969, 1970, 1973), and Furubotn and Pejovich (1972, 1973, 1974), among others. Further theoretical and empirical contributions to this earlier stream of research literature, which is referred to as the ‘classical property rights theory’ (to contrast with modern property rights theory), have been made by North (1981, 1990), Barzel (1982, 1997), Cheung (1983, 1990), Libecap (1989), Eggertsson (1990), and Alston *et al.* (1996), among others. In addition Grossman and Hart (1986) and Hart and Moore (1990) also contributed to the development of the property rights theory. Their contribution in the research literature is called the ‘modern property rights theory’ sometimes called the ‘GHM model’) (Kim and Mahoney, 2005).

The ‘classical’ form of the property rights theory focuses on the historical and institutional context that shapes and changes property rights (and therefore led to ‘getting the incentives right’). The ‘modern’ version of the property rights theory, utilizing advanced mathematical tools, attempts stylized modelling of ownership and incentive structures (Kim and Mahoney, 2005). In this thesis focus is given to the ‘classical’ property rights theory and its application to planning and development issues.

The following basic concepts in the property rights theory will be introduced at the beginning:

- Rights in land can include more than the right of ownership. Property rights can be divided into several different partial rights (bundle of rights). Multiple dimensions

of property rights have the important economic implication that many different people are able to hold parts of the rights to a property

- The actor who owns a part of the property rights of a resource is called the residual claimant
- All economic activities including trade and production are exchanges of bundles of property rights (Furubotn and Pejovich, 1972)
- Attributes to which rights are not assigned by formal or informal contract – or resources with unclear property rights - are said to be in the public domain
- Economic concepts of property rights can be distinguished from legal concepts of property rights. Barzel (1997) views that the most relevant concepts of property rights are the economic rights. Kim and Mahoney (2005) attempt a balanced theoretical approach in considering the economic aspects of property rights as a complementary concept within the legal framework that allows such property rights legal protection and third-party enforcement.

The key point of the property rights theory is that property rights matter and provide the basic economic incentive system that shapes resource allocation. Or put differently, an important insight of the property rights theory is that different specifications of property rights arise in response to the economic problem of allocating scarce resources, and the prevailing specification of property rights affects economic behaviour and economic outcomes (Coase, 1960; Pejovich, 1982, 1995). Buitelaar (2002) connected the property rights theory to transaction costs theory and explained it in the following way:

“The central assumption behind the property rights paradigm is that the better the property rights are delineated and the lower the transaction costs, the better the parties involved are capable of internalizing externalities. According to the institutional economists, the existence of transaction costs is a fundamental element in the emergence and evolution of property rights.”

Therefore, e.g. in relation to functioning of land and property markets, property rights should be delineated and assigned to improve market efficiency, i.e. to reduce externalities. This should be achieved by reducing transaction costs and, if those cannot be reduced to zero, reassigning and redelineating property rights over land. (see also Van der Krabben, 2009)

However, there is no one clear approach among the institutional economists concerning the emergence and evolution of property rights. Earliest property rights theorists such as Demsetz (1967) were optimistic about the evolution of property rights turning towards an economic efficiency. Demsetz (1967) defines the property rights in the following way:

“Property rights convey the right to benefit or harm oneself or others. Harming a competitor by producing superior products may be permitted, while shooting him may not. A man may be permitted to benefit himself by shooting an intruder but be prohibited from selling below a price floor. It is clear, then, that property rights specify how persons may be benefited and harmed, and, therefore, who must pay whom to modify the actions taken by persons. The recognition of this leads easily to the close relationship between property rights and externalities (...). No harmful or beneficial effect is external to the world. Some person or persons always suffer or enjoy these effects. What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the

decisions of one or more of the interacting persons is too high to make it worthwhile, and this is what the term shall mean here. "Internalizing" such effects refers to a process, usually a change in property rights, that enables these effects to bear (in greater degree) on all interacting persons."

Demsetz (1967) argued that a primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities, i.e. the internalization of beneficial and harmful effects. According to him, *"the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities"*. In addition the gains of internalization of property rights should be larger than the cost of internalization in order to develop the new property rights. Therefore he has argued that *"property rights arise when it becomes economic for those affected by externalities to internalize benefits and costs"*. Hence, the forces which will govern the particular form of right ownership (*"some broad principles governing the development of property rights in communities oriented to private property"*) are the market prices or production possibilities or other possibility of profits.

Therefore, earliest theories concerning property rights assumed that the institutional environment is changing towards economic efficiency through the influence of market forces. Precisely, institutions evolve over time in search of more efficient allocation of rights and institutions tend to move towards more efficient economic solutions through negotiations between the interested contractual parties. Libecap (1989) in his research book *"Contracting for property rights"* as well as also North (1990) *"Institutions, Institutional change and economic performance"* provide facts that challenge this earlier optimistic assumption (Mahoney, 2005).

North (1990) argues that in a world of zero transaction costs, this economic process would be immediate and efficient. However, if transaction costs are positive and non-negligible, this economic process may be more gradual, and in some economic cases may result in failure to reach contractual agreement. According to Libecap (1989)⁴⁰ the property rights formation is a more complex process than assumed by theories derived from neoclassical approaches and earlier institutional analysis literature. He convincingly argues that the assumption that property rights will naturally move toward economic efficiency is frequently glib and inaccurate (Mahoney, 2005). Libecap (1989) uses the term 'contracting' in order to describe *"efforts by individuals to assign or to modify property rights"*. These efforts involve either negotiations among immediate group members or lobbying activities that take place at higher levels of government:

- *"bargaining among private claimants within groups to adopt or to change group rules and customs regarding the allocation and use of property"*
- *lobbying and political negotiations among private claimants, bureaucrats, politicians, and judges to implement or to alter more formal property laws and administrative rulings"*.

The book of Gary D. Libecap (1989) was an important contribution to the development of property rights theory. It gives a better understanding of the political negotiations underlying

⁴⁰ See also Alston *et al.*, 1999

property rights and the interest of parties involved. Libecap discusses the way, in which property rights are formed and the processes by which property rights are changed. It can be seen from this book that the state does not always act to minimize costs and maximize economic value. In particular, Libecap deals with the question of why property rights take so much variety in the form and concentrate on the actual process by which property institutions change.

Libecap (1989, p.10) has noted that the nature in which property rights are defined and enforced fundamentally impacts the performance of an economy for at least two reasons:

- *“First, by assigning ownership to valuable resources and by designating who bears the economic rewards and costs of resource-use decisions, property rights institutions structure incentives for economic behaviour within the society.*
- *Second, by allocating decision-making authority, the prevailing property rights arrangement determines who the key actors are in the economic system.”*

Because of this he argues that it is important to analyze how various property institutions emerge. We learn from Libecap’s book about the importance of distributional conflicts among interests groups⁴¹ in shaping the institutional structure. In particular we learn about the influence of political entities on the processes of property rights formation and the conflicting interests and bargaining strength of those affected (*“political bargaining or contracting underlying the establishment or change of property institution and the motives and political power of the various parties involved”*). Because certain property rights arrangements can reduce transaction costs and encourage investments there is public good aspect involved. As with all public goods, the process of creating or modifying property rights is always exposed in distributional conflicts and bargaining strength of those affected. Distributional conflicts are concerned with different expectations of gains among participants. Therefore property rights formation is *“determined through the political process, involving either negotiations among immediate group members or lobbying activities at higher levels of government”*. In the political bargaining over institutional change, the positions taken by the various bargaining parties, including for example private claimants, bureaucrats, and politicians, will be moulded by their private expected net gains, as well as by the actions of the other parties. The private net gains are determined by the individual’s anticipated share in the aggregate or social benefits of certain property rights arrangements. In addition, the political process of defining and enforcing property rights can be divisive because of the distributional implications of different property rights allocations. If influential parties cannot be sufficiently compensated, beneficial institutional change may not occur. Even though society would be better off with the public good, the potential economic gains fostered by the proposed arrangement will be forgone by opposing of institutional change by influential parties. (Libecap, 1989)

Consequently, Libecap (1989) argues that distributional conflicts, and efforts to address such conflicts are difficult to predict and can block institutional change. The property rights arrangement which ultimately emerges as institutional change, bears little resemblance to that which was initially proposed.

⁴¹ The three main interest groups, which were distinguished by Libecap, are: private claimants, politicians, and bureaucrats.

“In principle, it is possible to construct a side payment scheme that would compensate those who otherwise would oppose a desirable change in property rights. But in practice, devising perfectly compensating side payments to bring agreement encounters formidable obstacles, including questions of who would receive side payments, who should pay, what size the compensation should be, and what form the compensation should take”. Libecap (1989, p.6)

In the property rights theory there is no one clear approach to the emergence of the property rights. Libecap assumes that certain distribution of property rights can reduce transaction costs but the transaction costs are not explanatory variables. On the other hand, Webster and Lai (2003, p.3) argue that: *“Institutions emerge to reduce transaction costs and more generally, the costs of voluntary co-operation. Markets are institutions that reduce the costs of organizing a multitude of individual transactions. Government edicts, policy and regulations are institutions that reduce the cost of collective transactions”*. Barzel also emphasised the importance of transaction costs in a foreword to the book of Webster and Lai (2003, p.vii). He summarised that the theory of property rights offers the following fundamental three-part proposition:

1. *“Subject to the costs of transacting, individuals will organise and allocate their rights so as to maximise their joint wealth*
2. *The level of wealth is enhanced when economic rights are allocated such that individuals bear more of the effects of their actions; that is, they reap higher rewards from inducing gains for others and conversely suffer heavier penalties from inducing losses.*
3. *Because the costs of transacting are positive, the Pareto conditions are never met.”*

Van der Krabben (2009) also argues that the degree to which ownership is established over a commodity's separate attributes depends on the costs of creating and policing contracts that establish that ownership – that is, transaction costs. Transaction costs can be defined as the cost associated with transfer, capture and protection of rights.

Therefore there are different approaches concerning emergence and evolution of property rights. One, which emphasises the transaction cost as a main factor underlying the emergence of the property rights. This approach stresses the importance of transaction costs as an explanatory variable. The second is the approach of Libecap emphasising the political processes of defining and enforcing property rights.

In response to Libecap's position in Webster and Lai (2003, p.5) we can find: *“Self-regarding endeavours can lead to zero-sum result: rent-seeking groups using their position to create artificial income for themselves at the expense of other groups; corrupt officials, workers and politicians poverty stealing the principal's resources; indolent managers, politicians, professionals and workers free riding on others' labour.”*

Also Needham (2006) criticized indirectly the Libecap position. Libecap's position refers to the public choice theory which assumes that a state agency does not act in the public interest. Needham (2006, p.62) criticized the public choice theory approach, he pointed out that: *“Public choice theory does not convince me. A healthy scepticism towards state agencies is warranted; automatic cynicism is not. If a positive planning theory (Poulton 1991) based on*

empirical research shows that state agencies sometimes act to promote the interests of politicians and civil servants, this has to be taken into account when evaluating public policy. But that is different from assuming that state agencies do nothing other than that. Public choice theories, however sophisticated, do no justice to the complexities of local and national politics, nor to the realities of what state agencies do, nor to the constraints on arbitrary and self-seeking action imposed by long-established institutions (Hoogerwerf 1995)."

Webster and Lai (2003, p.3) argue that *"institutions reduce transaction costs by assigning property rights over scarce resources"*. But if the right to benefit from a resource is assigned but problematically divided between several different residual claimants, does it mean that this situation reduces transaction costs? If resources would be left in the public domain, government could use it to increase economic growth. In addition as long as access to, and use of, public property is subject, as it usually is, to restrictions – such as prohibiting the hunting of young game animals – one cannot conclude that rights would be better delineated under private ownership than they are under public ownership (Barzel, 1997, p.100).

There is also an argument against the transaction costs from Needham (2006, p.50) concerning the diversity of the property rights arrangements, as he puts it: *"And finally we mention the theory that property rights within a society evolve as technology changes, as population grows, and so on, in such a way as to make it possible to achieve higher economic efficiency under the new circumstances. Ellickson (1993: 1392) says 'Land regimes evolve in pragmatic fashion to exploit scale efficiencies and spread risks.' If this theory is true, then all countries which adapt to the same technological changes will tend to have the same land system."* Therefore the transaction cost explanation ignores the social embeddedness.

Needham (2006, p10-11) continues: *"We must not forget, however, that there can be great inertia in rights in land. Often it takes a long time to change them. One reason is that they represent deeply rooted moral beliefs. Many of the changes are fairly marginal and have the form of forbidding what previously was a presumptive right. For example, I might think that I have the right to play music in my back garden: the neighbour asks me to make less noise: I refuse for I regard playing music as my presumptive right: the neighbour tries to get the court to stop me: the judge says that the neighbour has no right to no noise nuisance from me (my presumptive right is confirmed by law): changes in electronics make it possible to play music louder and louder: the interests of so many people are so harmed by this that politicians take up the cause: then the lawmaker gives people a right to freedom from loud music from their neighbours. The law has been changed. A new right in land has been created."*

Therefore, the next perspective in the discussion on why property rights emerge, refers to the fact that property rights are socially constructed. In addition there is also the theory of path dependence. Libecap as well as North (1990) emphasized the roles of time and legal precedent in historical path dependences for institutional change (important historical path dependence in determining the kind of property rights that can be adopted at any time). North (1990) argues that the high degree of path-dependency of a given institutional framework is an important factor in explaining persistent low growth rates in developing countries. More precisely *"an initial set of institutions that provide disincentives to productive activity will create organisations and interest groups with a stake in the existing constraints"*. Past decisions concerning property rights arrangements can be seen as a limit of possible institutional solutions. *"Past political agreements on property institutions create the*

framework for responding to new common pool losses, the identities of the agents for and opponents of change, their effectiveness in political bargaining, and the range of feasible alternatives” (Libecap, 1989, p.117). North (1990) has noted, *“once a development path is set on a particular course, the network externalities, the learning process of organisations, and the historically derived subjective modelling of the issues reinforce the course”* (North, 1990, p.99).

There is no one unified approach on how property rights emerge. All different approaches provide us with an interesting perspective of the processes through which institutional arrangements are made. Awareness of this helps to understand why inefficient property rights regimes can persist, and allows discussion on how to change property rights so as to achieve certain effects on land policy.

3.2 Property rights in land

Discussions concerning property rights in land concentrate on two main areas. These areas are mutually connected and the discussion often follows gradually from one aspect to another:

- First, to a fundamental right such as the ownership of land which consists of the bundle of rights and the possible modification of them (for example Needham, 2006, Needham and Louw, 2006; Buitelaar and Needam, 2007ab, Geuting, 2007)
- Second, types of property rights and re-assignment of them (open access, pure private ownership, state ownership, co-ownership and other hybrid forms. (Starting from Demsetz ,1967⁴², Hardin, 1968, Bromley, 1991, Webster, 2005 who discuss balance of rights, between public and private parties, between different levels of government and between discretion and certainty in rights)⁴³

Deconstructing the idea of property rights can be presented as a more sophisticated way to view the commodities⁴⁴. It assumes that one commodity has multiple attributes, like rights, which can be separable, as Webster (2005) puts it:

“Deconstructing the idea of property rights in this way leads to the analytical view of commodities having multiple attributes, the rights to which are, in principle, infinitely separable. A contract, a government policy or a national constitution will assign clear responsibility over some attributes of a set of resources but not others.”

⁴² Demsetz (1967) identified different types of rights: communal ownership (a right exercised by all members of the community, the community denies to the state or to individual citizens the right to interfere with any person’s exercise of communally-owned rights – e.g. rights to till and to hunt the land), private ownership (the community recognizes the right of the owner to exclude others from exercising the owner’s private rights), and state ownership (the state may exclude anyone from the use of a right as long as the state follows accepted political procedures for determining who may not use state-owned property).

⁴³ Theory of property rights is so pluralist that the conclusion from studying the perspectives of different authors is that any particular system of rights in land or particular property rights regime is ‘the best’ (see also Needham, 2006)

⁴⁴ See also Evans 2000

Therefore, the property rights approach emphasises the rights to use a property which is owned instead of the property itself:

“It is not the resource itself which is owned; it is a bundle, or a portion, of the right to use a resource that is owned. In its original meaning, property referred solely to a right, title, or interest, and resources could not be identified as property any more than they could be identified as right, title, or interest” (Alchian & Demsetz, 1973:17)

In relation to rights in land, Needham (2006, p.7) defined the possible scope of the right in the following way:

“Rights in land can include more than the right of ownership. For example, there can be a right to use, such as that formalized in a tenancy lease which might be ‘held’ by someone other than the owner of the land or building. There can also be a right to graze cattle, or to hunt, or to gather wood, on someone else’s land. There can be a right of way, or a way leave, over someone else’s land.”

Therefore, property rights may involve a variety of specific rights, such as *“the right to exclude nonowners from access, the right to appropriate the stream of economic rents from use of and investments in the resource, and the rights to sell or otherwise transfer the resource to others”* (Libecap 1989, p.1). It is often said that property rights can be laid out in a bundle of rights. Usual separation of the bundle of rights distinguishes (e.g. De Alessi, 1991) between three basic partial interrelated rights like:

- *usus* (right to use)
- *usus fructus* (right to income)
- *abusus* (right to transfer).

The division into the three mentioned above, partial rights (*usus* - right to use, *usus fructus* - right to income and *abusus* - right to transfer) is a basic deconstruction of property rights. In relation to land there are many different kinds of classifications and ways of thinking about the topic. For example Needham (2006, p.35) distinguished the following property rights in land:

- *“the right to use land in a particular way*
- *the situation when one person has the right to use a piece of land in all possible ways (full ownership)*
- *the situation when one person has the right to use a piece of land in so many, and certain specific ways that that person can be regarded as having ownership of the land (legal ownership)”*

According to Needham the right to use land in a particular way is a right only if the lawmaker recognises it as such. A list of a possible property rights in land can be drawn up for example by separate statutes. Full ownership of land refers to *“the greater possible interest in a thing”* (Honoré 1961). Needham explains the full ownership in the following way: *“The situation when all possible rights over a thing are owned by one (legal) person is described by the Roman Law concept of ‘dominium’. The Napoleonic Code took up this concept and then introduced it into the many countries, which Napoleon occupied. Dominium means being able*

to use something, enjoy it and dispose of it 'de la manière la plus absolue' (Code Civil de Napoleon, 1804, art.544) and it applies to any thing, not only land. It is not recognized legally in countries in the Anglo-Saxon tradition, but it can still be used there didactically"

Therefore, we cannot make a comprehensive list of what 'dominium' could possibly include. Absolute ownership includes even rights which are not included in the list. However, it was such attempts to empirically distinguish the rights included into the concept of full ownership. It was done by Kruse (1939) and Honoré (1961). Kruse identified the right of full ownership as the set of powers that constantly occur in all normally developed laws of property:

- (a) the power to use the good*
- (b) the power to 'alienate', pledge or otherwise by declaration or will to dispose of the good, to contract rights in it'*
- (c) the power to use the good, together with the owner's other goods, as the basis of credit*
- (d) the power of hereditary succession*
- (e) the power to protect the right to the property*

Honoré identified the incidence of ownership:

- (a) the right to posses: that is, exclusive physical control of the thing owned. If a thing cannot be possessed physically (e.g. a river), possession can be understood as the right to exclude others from the use or other benefits from the thing;*
- (b) the right to use: that is, for personal enjoyment and use (as distinct from the rights (c) and (d) below);*
- (c) the right to manage: that is, to decide how and by whom a thing shall be used;*
- (d) the right to the income: that is, to the benefits derived from foregoing personal use of a thing and allowing others to use it;*
- (e) the right to the capital: that is, the power to alienate the thing and to consume, waste, or modify or destroy it;*
- (f) the right to security: that is, immunity from expropriation;*
- (g) the power of transmissibility: that is, the power to devise or bequeath the thing indefinitely (i.e. from generation to generation);*
- (h) the absence of term: that is, the indeterminate length of one's ownership rights;*
- (i) the prohibition of harmful use: that is, one's duty to forbear from using the thing in certain ways harmful to others;*
- (j) the liability to execution: that is, liability to have the thing taken away for repayment of a debt;*
- (k) the residuary character: that is, the existence of rules governing the reversion of lapsed ownership rights.*

Honoré includes in his list not only rights but also powers and obligations. Always someone's rights involve obligations to others.

Legal ownership of land concerns the Anglo-Saxon tradition, where one owns one or more rights in a piece of land, not the land itself. The ownership is complete in Roman law when it includes: the right to use (usus), the right to the fruits (fructus), and the right to disposal (abusus). (see Needham, 2006, p.39)

Having deconstructed the idea of property rights the discussion can follow into the superiority of rights or the balance of rights and finally the attempt to discuss the question of what is the right balance of rights. I would like to point out here how difficult it is to answer the question. In the discussion concerning the superiority of rights, the emphasis is on the existence of other rights that purely public or private. For example Chang (2006) criticized the fact that orthodox literature concentrates only on three types of property rights (open access, pure private ownership, state ownership) while other even hybrid forms exist. In addition, the superiority of private property rights and desirability of strong protection of property rights is dominant in the thinking in orthodox literature, which was also criticized by Chang (2006). The discussion concerning the overall balance of rights addresses what is called by Webster (2005) the key issue at the heart of institutional design problem concerning the relationship between state and private property rights, the balance of central and local rights, and the codified and discretionary rights in planning in the public interests (Webster 2005). The three main dimensions of institutional design are expressed by the three following questions:

- *how rights should be distributed between state and private property owners- including third parties affected by contracts between one or more other parties*
- *how state rights should be allocated between different levels and spatial scales of governance*
- *what institutional mechanisms should be used to most effectively and efficiently exercise those rights in the interest of achieving better coordinated cities* (Webster 2005)

Importantly, Webster (2005) argues that getting the appropriate overall balance of rights is difficult as it turns on the dynamic boundaries between planned government action and spontaneous market forces. Therefore getting the balance of right is a matter of institutional design. It is a difficult question, which takes decades of experimentations. In the history of economic thought, the approach to this question was the subject of continuous debate on the boundary between government and markets. Keynesian interventionism was replaced by Hayek's emphasis on spontaneous economic order as already discussed above. In reference for example to urban planning, the search for the appropriate boundary between planned government action and spontaneous market forces (therefore balance in rights) developed differently in time and in places, as Webster (2005) puts it: "*Urban planning is constantly in tension; always evolving and forever re-inventing itself.*"

3.3 Planning and land development in terms of property rights theory

Much has been written about property rights, but the application of the property rights theory to planning and development has occurred recently. The ideas of the property rights theory have been applied to make an argument for less public land-use planning in the 1980s under the political benevolence of Thatcherism. Corkindale (1998) and Pennington (2002) applied the property rights approach in academic discussion for libertarian purposes. Recently Webster and Lai (2003) have made a systematic argument from the property rights theory for a particular approach to urban management. Needham (2006) has also investigated the relationship between land-use planning and property rights.

Recently, the property rights approach has increasingly been applied to the analysis of land-use planning in relation to the way land and property markets operate (i.e. Alexander, 1992,

2001a, 2001b, 2002a, 2002b; Bromley, 1991, 2001, 2004 ab; Buitelaar, 2003; Buitelaar & Needham, 2007 a,b; 1978, 1980; Van der Krabben and Buitelaar, 2007; Lai, 1997, 2002; Needham, 2006; Renard, 2007; Webster, 2007; Webster and Lai, 2003). The journal *Town Planning Review* (2007) also dedicated a special issue to the property rights approach in land-use planning. The authors participating in this special issue tried to analyze the possibility to influence land use by changing rights in land. In this way they try to think more innovatively about instruments for bringing changes in land use than the more customary ways of public interventions and regulations. The questions discussed in this special issue were the following: *“Could new rules for stimulating private initiative with property rights be used as an instrument for better achieving (some of the) existing goals of land use planning? Would that as an instrument be more effective and/or more efficient than the ‘customary’ way of pursuing land use planning?”* (Buitelaar & Needham 2007b).

Therefore, the property rights approach is seen as an interesting supplement (and sometimes even a replacement) of more directive planning instruments such as spatial plans and policy documents (Buitelaar & Needham, 2007a,b; Geuting, 2007; Segeren *et al.* 2007). Geuting (2007) for example strongly argues *“if private property rights are used differently, this influences the property development process and consequentially the built environment itself.”* This approach is based on the idea that the markets in rights can be created and structured purposefully in such a way that the outcome can be influenced. Needham (2006, p.60) wrote: *“If the aim of that planning (or at least one of its aims) is to use economic resources efficiently, then according to ‘the Coase theorem’ (as it has come to be called) that will be achieved by actions which minimize transaction costs. Land-use planning should be directed to reducing transaction costs.”* If land-use planning is used to reduce transaction costs, it can be very different compared to land-use planning, which aims to correct market failures.

Needham (2006, p.10) pointed out, that land use can be changed, not only by changing the content of land use planning but also by changing rights in land. He emphasised that rights in land are a social creation. Therefore the society can decide whether to protect or not some interests in land by calling them rights. It is the same process as land use planning or the content of the planning policy. Needham (2006) for example argues:

“Individuals act in their self-interest and if they interact under certain conditions, the result will be a better use of scarce resources than if those individuals are restricted in their actions by land-use planning. That will however not realize the desired economic goal unless the market in property rights is appropriate.”

So it is obvious that land use can be influenced not only by land-use planning but by changing rights in land. The current way of thinking in this approach can also be summarized citing Buitelaar & Needham (2007a):

“Then the question is: what do we know about purposefully organizing markets in property rights so as to achieve planning goals in a situation in which we have relied so long on public regulations and intervention to do that? What could purposefully organizing markets, or other institutional arrangements that stimulate private initiative in particular directions, involve? That is, can the same outcomes be achieved in a different way?”

Moreover, it could well be that self-organizing communities consisting of private parties 'using' property rights produce 'better' outcomes."

The idea of purposefully organizing markets can be explained more precisely following for example Geuting (2007). First, based on Tiesdell and Allmendinger (2005) and Needham (2006) five different ways for government to correct externalities in property development in order to realize policy objectives can be summarized:

- *"By public rules like a building permit or a zoning plan, in which designation and use of land and buildings are stipulated*
- *By acting as an active market agent in the property development process. For example, in cases of public-private partnership, or when a city pursues active land policy by selling serviced land to developers*
- *By stimulating other market agents with subsidies and taxes*
- *By developing and making available information that results in a cheaper development process because transaction costs are lower*
- *By actively influencing the structure of property markets by determining or modifying the formal rules that make voluntary interaction between market agents possible."*

Geuting (2007) calls the last option, in line with Pennington (2002), proprietary governance and precisely described it as follows:

"Proprietary governance is a situation, in which the delineation of rights has been adapted to a pattern that connects with policy goals in spatial planning."

In such a situation, markets have been purposefully influenced to achieve certain goals. If it is considered that certain goals of land policy can be achieved by using specific methods of land development, the knowledge of the relationship between the delineation of rights and methods is of crucial importance.

Geuting (2007) argues that in the proprietary governance situation the modification can be either direct or indirect:

- *"Direct changes can take the form of changes in civil law, like changing the property rights in land or real estate. It is a direct change in market structure because the change in the delineation of private rights influences the structure of market in property development – new markets arise in rights that have been created by the lawmaker.*
- *An example of indirect change is change in a different field of law, like tax law, contract law or public law. This change leads to a different use of existing private property rights, and could make it more attractive to use certain property-rights arrangements, that were less or differently used before the change in the property-rights regime. Changes of this nature are presently primarily used as directive policy tools, but public law can also be of a non-directive character, when it is primarily used to influence market structures".*

The basic thoughts underlying the property rights theory and its application to land use planning and urban management issues was also for example explained by Van der Krabben (2009). In particular, he discussed how to make use of the property rights approach to analyse the nature of externality problems in the Dutch retail market. He pointed out that a property rights solution to an efficiency problem is to *“redefine property rights in such a way that the externality problems and other efficiency problems in the retail market can be reduced, without causing other efficiency problems”*. He proposed redelineating and reassigning property rights over land by assigning the rights over the negative effects to the developers of peripheral retail development. In this way the developers of peripheral retail development become a residual claimant over the negative effects of the peripheral retail developments. However, this theory is still developing and must not be confused with a claim for ‘more market, less government’. It is an additional alternative to ways of pursuing the same policy goals (Van der Krabben, 2009).

In addition, in connection to the issue of planning and development, Needham (2006, p.8-9) while discussing rights and interests in land, distinguished between legal rights and planning rights. Legal rights belong to those who hold rights in land protected by law, as Needham pointed out: *“of all the various interests that there are and can be in a plot of land, it is only those which are protected by law which should be called a right.”* Planning rights refers (also after Alexander 2002) to the rights of all sorts of people who are entitled to be consulted or make an objection during the plan elaboration process as Needham (2006, p.8) puts it:

“If you study the formal procedures which land-use planning must follow, however, you see that they are designed to do more than protect legal rights in land. It is not just those who hold rights in land in the plan area who are entitled to be consulted, to make their objections known, to appeal to a court of law. All sorts of other people are entitled to do that too: the details vary from country to country and from type of planning decision to type of planning decision. The law gives a place to these people in the planning procedures (what Alexander (2002a) calls ‘planning rights’) because they have a legitimate interest – in the view of the law maker – in how the land in the plan area is used, even though they hold no legal rights in it.”

Deconstruction of the idea of rights in land also led to the discussion of tradable building rights in land development processes (separation of right to build (development right) from the ownership right). It is also called transferable development rights – TDRs. Therefore, the idea emerged that the market in rights can be created. Transferable development rights – (TDRs) are proposed in American literature as an alternative to zoning as it is argued that this solution can diminish the inequities caused by zoning. The idea of transferable development rights are explained clearly in an American context for example by O’Sullivan (2003, p.242-243):

“Under TDR policy, the city establishes a preservation zone (the north area) and the development zone (the southern area). The south area is zoned for 10 dwellings per acre, giving Mr. South (the southern landowner) the right to build a total of 250 dwellings. Ms. North (the northern landowner) is not allowed to develop her land, but instead issued 250 development coupons. These development coupons can be used to override zoning restrictions in the development zone. If the South wants to build 20 dwellings on one acre of land, he must purchase 10 development coupons from the North. The TDR policy gives

each landowner development rights (the right to build 250 houses) and allows the owners of preserved land to transfer their development right to other areas of the city. When the northern landowner sells her coupons, she is at least partially compensated for the losses in property value caused by the rezoning of her land.”

Finally, a distinction should be made between the property rights approach as an analytical device and a normative approach (proprietary governance). If we understand that in the heart of the property rights theory is the statement that the delineation and allocation of property rights matter for the development outcome, it can be said that the property rights theory can be used in two ways as an analytical tool (deconstruction of property rights) and a normative approach (a theory). I will argue after Allmendinger (2002) that all theories are to greater and lesser degrees normative. Allmendinger (2002, p.8-10) distinguished between normative theory, prescriptive theory and empirical theory. Normative theory relates to the question of how the world ought to be and provides ideas about how to achieve this state. Prescriptive theory is concerned with the best means of achieving a desired condition. Empirical theories explain and interpret reality and focus on causal relationships and on dependent and independent variables. Normative elements can be found in the prescriptive theory and also in empirical theories. In the property rights theory, all these different kinds of theories are interrelated.

3.4 The mechanisms of coordination and governance structures

Before the concept of the property rights regime in land development will be introduced there is a need to discuss the governance structure and co-ordination mechanism according to neo-classical economics and new institutional economics.

Neo-classical land-price theories assume that co-ordination between supply and demand is achieved through the price mechanism. There are, however, other possible co-ordination mechanisms, suggested by new institutional economists, including for instance imposed rules and mutual trust. The other co-ordination mechanism takes into consideration the effect of institutions. Therefore they pay attention to rules (both formal and informal).

For example Needham and De Kam (2004) made an argument (based on evidence from cases of Dutch housing associations acquiring building land) for reconsidering the assumption that, when land is exchanged, the transaction is co-ordinated by the price mechanism. There are other possible mechanisms - namely, trust and rules imposed from above. They argue that land is acquired through a variety of co-ordinating mechanisms, and tried to explain why the particular choice of mechanisms is made⁴⁵.

Needham and De Kam (2004) regarded a transaction in land as a case of co-ordination. Land development can also be regarded as a case of co-ordination. If *‘co-ordination implies the*

⁴⁵ Transaction cost economics (one of the side streams within new institutional economics) tries to challenge the assumption of neo-classical economics of price as the co-ordinating mechanisms. Transaction cost economics offers an explanatory hypothesis that a form of governance will be chosen which minimizes the cost of making the transaction in the way which the actors want, taking into account their motivations and what they want to produce (the good or service, the quality, the quantity) (Needham and De Kam, 2004).

bringing into relationship (of) otherwise disparate activities and events' (Frances *et al.*, 1991, p.3 cited in Needham and De Kam, 2004), then land development, by bringing different actors into a relationship could be regarded as a case of co-ordination.

The co-ordination mechanisms of market and the state are critically discussed at the beginning of my thesis (Chapter One). Institutional economists distinguish three mechanisms of co-ordination: market, hierarchy and networks (Buitelaar, 2003).

Instead of the discussion between the failure of the market and the failure of the government, Buitelaar (2007, p. 5) proposed to reframe the discussion and view the land development process from the perspective of necessary coordination between different actors and agencies participating in the process. The way the coordination between different actors is arranged is called 'governance'⁴⁶, which is a more overarching concept than the market versus government dichotomy (Alexander, 2001a). In the last quarter of the twentieth century the approach that dominated the debate on government versus market has changed to a new form of local governance with more emphasis on partnership between private and public decision makers, as Webster and Lai (2003, p.2) put it: "*Governments became enablers rather than suppliers, and partners of, not opponents to, markets*". Pierre (1999) puts it: "*Governance refers to the processes of regulation, coordination, and control*". Therefore the choice between the market and the government can be replaced by the three coordination models: market, hierarchy and networks. This idea is built on the central 'models of coordination' within the new institutional economics: the various government structures presented by (Williamson 1975, 1985)⁴⁷ and models of coordination (Thompson *et al.*, 1991). (Buitelaar 2002, 2003)

Therefore these three analytical models of coordination are three distinct governance structures. Market and hierarchy models derived from Williamson (1975) are well known within new institutional economics. The networks are less known but according to Buitelaar (2003) are essential to do justice to reality. It is not important who does the coordinating. All three models can be found in both the public sector and – especially markets and networks – in the private sector. (Buitelaar, 2003)

In market structure, in the new institutional economics approach, it is still its price mechanism that brings results. However this is the model of coordination that can be found in both the public and the private sector. It is a mistake to assume that the market and the private sector are the same. In addition it should be emphasized that from the perspective of the new institutional economics, the government and the market are not mutually exclusive and neither can work without the other. The backgrounds for the existence of markets are the rules that govern the market. According to Hodson (2002, p.44) market is an institutional

⁴⁶ Healey (1997, p.59) defines the governance in the following way: "*Governance, that is, the management of the common affairs of political communities, thus involves much more than the formal institutions of government (...) Governance process themselves generate relational networks, which may cut across or act to draw together and interlink the relational webs of the life of households and firms. Governance activity may be aimed at sustaining relational webs, or at transforming them. Spatial planning efforts, as an example of governance activity, are inherently drawn into such processes.*"

⁴⁷ Williamson discussed the vertical integration of production giving another explanation for the emergence of firms or organizations. Furthermore his concept of hierarchy influenced the theoretisation of the governance of planning

arrangement consisting of rules, both formal and informal, which are regulating the exchanges. It is a different approach to the market from that which is found in the neoclassical and welfare economics theories. (Buitelaar, 2003; Webster and Lai, 2003; Needham, 2006)

Therefore there will always be a need for some public intervention and regulation. Geuting (2007) pointed out that market cannot function without rules introduced by government – *“if the market is a dance, then the state provides the orchestra and the dance floor”* (Lindblom, 2001, 102, cited in Geuting (2007)). In the new institutional economics approach to markets, the government does not interfere in the market of property development, but the government concentrates on creating good frameworks within which markets can operate. Geuting (2007) noted that there has been growing attention in this field of research concerning which way market structuring influences property development. Attention to this issue has been paid in the last few years, particularly in the UK and the USA. However, according to Geuting (2007) this issue still has hardly been explored, due to the following reasons:

“One of the reasons for this is the complexity of analyzing property-rights regimes in land and property markets. Another reason is that the topic of market structuring as it exists in law and economics is located somewhat on the fringes of planning and property research”. (see also Webster and Lai, 2003; Pennington, 2002; Corkindale, 1998; Fischel, 1980 and Siegen, 1972).

In addition Buitelaar & Needham (2007 b) have noted that:

“The way in which land is used is determined primarily, even when there is strong land use planning, by the people and organizations using and exchanging property rights in land. When people exchange rights freely and voluntarily we say that they do this ‘in the market’. Note that government bodies may act in this way, not just private persons and organizations- government bodies can buy, sell, rent and lease land and buildings using their market powers in the same way that private bodies do.”

Consequently, most changes in land use are done through the market. Even in cases where there is classical hierarchical planning. Consistent with Serger *et al.* (2007) they emphasize that the planning can be seen as an ‘ordering’ the market.

The next is hierarchal governance. Mc‘Guinness (1991, pp.74-75, cited in Buitelaar, 2007, p.28, with his parenthesis) defined the hierarchal form of governance:

“a class of governance whose distinguishing feature is that a recourse owner accepts restrictions (often simply because he has to) on his sole rights to use his resources in whatever way he might choose. Within those bounds of some agreed domain, he allows his resources to be controlled by an authorized decision-making unit to which he might or might not belong”

On the other hand the networks model of coordination pays attention to the importance of contracting and networking. Buitelaar (2007) pointed out the difficulties in obtaining a clear description of networks. He cited for example the definition of networks given by Thompson (2003) pointing out that this definition mixes the terms of institutions and organisations:

“When discussing networks, in the first instance at least, it is probably institutional arrangements like informal groups, mutual-aid organizations, small-scale and local institutional networks, cooperative forms of social existence, self-help groups, and so on that come immediately to mind.” (Buitelaar, 2007, p.29)

Healey (1997, p.58) defined network in the following way:

“The concept of webs of relations is captured these days in the much used metaphor of networks. Social networks overlap and intersect in complex ways. Many people operate in several networks at once...” (see also Table 3.)

Table 3. The governance structure within which the co-ordination takes place

The governance structure	
Market	Market is an institutional arrangement consisting of rules, which regulate free exchanges. Public and private law
Hierarchies	A class of governance whose distinguishing feature is that a recourse owner accepts restrictions (often simply because he has to) on his sole rights to use his resources in whatever way he might choose. Within those bounds of some agreed domain, he allows his resources to be controlled by an authorized decision-making unit to which he might or might not belong Public law
Networks	The importance of contracting and networking Public and private law

Needham and De Kam (2004) argue for instance that the classifications of market, hierarchy and networks refer to structures or organizations rather than co-ordinating mechanisms. Instead they distinguished between three dimensions: the structure within which the co-ordination takes place (for example markets, hierarchies and networks), the mechanism by which the co-ordination is achieved (for example, price, imposed rules, mutual trust) and the actors whose wishes are co-ordinated with each other (for example, state agencies, commercial firms, private no-profit organizations). According to Needham and De Kam (2004) in mainstream economics there is much overlapping between these dimensions, as they put it:

“In particular, it is assumed that most co-ordination takes place between commercially oriented actors interacting in a totally impersonal and anonymous market with price as the

only co-ordinating mechanisms; and that where a state agency is involved, co-ordination is achieved through imposed rules in a hierarchical structure. We know, however, that the overlapping is far from being complete. For example, we know that ‘the state’ as an organization often operates as a private actor ‘in the market’ as a structure. And we know that ‘the market’ can include an astonishingly wide variety of mechanisms: ‘The market system is not a place but a web, not a location but a set of co-ordinated performances’ (Lindblom, 2001, p.40).”

Needham and De Kam (2004) argue that there are many combinations between structures, mechanisms and actors by which land (or any other goods or services) could be exchanged, which make analysis too complicated. I agree with this. They choose to concentrate on classification according to co-ordination mechanisms. In my research I will combine two approaches: governance structure (Table 3) and co-ordination mechanism (Table 4).

Table 4. The Co-ordinating mechanisms within three different governance structures: market (market governance), hierarchy (regulatory governance), and networks (cooperation governance)

The Co-ordinating Mechanisms	
Price	Anonymous suppliers and demanders find each other and agree to exchange (develop land) on the basis of a price, which arises in the course of anonymous interactions among many parties. The price ‘clears the market’: demand and supply react, each independently, to prices and in that way come into agreement.
Imposed Rules and Commands	Rules prevent both supply and demand from reacting to price. The price mechanism does not work. A supplier is ordered or required to exchange a good or service (land) with a specified demander for a certain price (for example, compulsory purchase); or there are rules which restrict who is eligible to receive
Co-operation and Trust	Two parties know each other and start to negotiate on the basis of mutual trust. They agree an exchange, which they might want to fix in a legal contract

First, the price as the co-ordinating mechanism will be presented. The price ‘clears the market’, demand and supply react, each independently, to prices and in that way come into agreement. The price mechanism can co-ordinate in this way, even when rules are imposed (therefore for instance in regulatory governance in my approach). Let’s take an example from Needham and De Kam (2004):

“An example would be the land market where there are constraints on building in a greenbelt: the rules prevent greenbelt land being supplied to housing, but within those rules there is a free land market, land prices arise during the interactions in that market, and those prices reach a level that clears the market with the given constraints.(...) And note also that price can co-ordinate the exchange even if the demander receives a subsidy, for that strengthens his/her position in the interactions (the demand curve has shifted upwards).”

However, price is not always the co-ordination mechanism. Actors and events can be brought into relationships by rules which prevent the price mechanism to work. When the market price is 100 and the price mechanism is the co-ordination mechanism, 100 will be paid. In cases where imposed rules and commands are co-ordination mechanisms, for example expropriation is used in order to acquire the land, for instance only 25 will be paid. On the other hand when co-operation and trust between two parties, which know each other and start to negotiate on the basis of mutual trust, is co-ordinating mechanism, the final price which they agree on could be 68 or 130 (or land will be exchanged between parties based on their agreement).

3.5 The property rights regime

Partitioning and allocation of property rights drives the various applications of the property rights theory. In relation to land development the concepts of the property right regime was discussed. In the theoretical model of land development process based on the property rights theory the central part is the concept of the property rights regime and the assumption that the definition and composition of the property-rights regime has an influence on the development outcome, as for example Geuting (2007) puts it:

“The legal delineation of rights defines the scope of market agents in the development process. It creates chances and also limits, by defining economic user rights connected to land”

A property rights regime in land development is defined as an integrated system of property rights connected to land that includes civil law, public law (e.g. planning law) and other types of law (like fiscal law and contract law) that influence the property market, (Geuting 2007). Therefore it is a complex system of legal rules⁴⁸ in relation to land, which can directly or indirectly influence the market performance.

Among the different classifications and delineations of institutions, the meso level of a distinction discussed by Alexander (2005, p.214) contains the property rights regime. Alexander made a distinction between different institutional levels: macro, meso and micro

⁴⁸ According to Buitelaar (2007, p.43) formal rules can be divided into rules regarding exchange and regarding use. Both can be subdivided further into public and private law, as Buitelaar (2007, p.48) puts it: *“Private law consists of general rules that are set up to facilitate exchange (not only with regard to land) between citizens. Under private law we find, among other things, property law and contract law. Examples of application of these private rules are development agreements, restrictive conveyance and easements. Public law comprises the rules that arrange the relationship between the citizens and the state, and between government agencies, like national planning acts or acts on compulsory purchase.”*

institutions. The meso level includes: *“incentives and constrains in the form of law, regulations and resources to develop and implement policies, programs, projects and plans.”*⁴⁹

The property rights regime includes the way property rights are defined between individual stakeholders on the market and the way property rights are defined between individual stakeholders and the different government participants. Therefore the property rights regime contains both the public and the private laws. The property rights regime includes legal and conventional aspects of property rights, as well as legal and conventional aspects of land use and development. Within the property rights regime there are different governance structures and different co-ordination mechanisms. The relation between the governance structure and co-ordination mechanism in the property rights regime is explained in the Table 6. The property rights regime defines land development structures, which could be more regulatory, cooperative or market like.

Table 5. The property rights regime in land development. The relation between property rights regime, governance structure and co-ordination mechanism

	Property rights regime System of property rights connected to land that includes public and private law		
	Land development structures		
Land development structure	Market Regime	Regulatory Regime	Cooperative Regime
Governance / Co-ordination mechanism	Market governance	Hierarchy governance	Networks governance
Price	X	x	x
Imposed rules	x	X	x
Trust	x	x	X

The property rights regime can be a combination of three different governance structures⁵⁰. Within each structure all co-ordination mechanisms are possible. However, for the market

⁴⁹ Macro level institutions of Alexander (2005) refer to the informal institutions like the system of social and cultural norms and values. Micro level institutions are related to the distinction of governance structure made by Williamson and relates to the rules governing the interaction between organisations and individuals.

⁵⁰ In literature, the concept of the land use regime has been discussed by Halleux *et al.* (2009). In the concept of land use regimes the property rights regime is one from the sub-regimes. Other subregimes includes co-operation regime and land regulation regime. It is argued that property rights regime relates to the market as a governance structure. Co-operative regime relates to network governance and trust as a co-ordination mechanism. Land regulation regime relates to hierarchy as a governance structure and authority as a co-ordination mechanism. In my research I assume that property rights regime contains both the public and the private laws. I understand that property rights regime is the higher concept and defines the land development structures. Within the property rights regime there are different governance structures and different coordination mechanisms. I do not think it is necessary to use the concept of the property rights regime only in relation to market governance, because the co-operation regime also defines the distribution of rights and duties, therefore it can be defined as the property rights regime.

subregime the price is the dominant co-ordination mechanism. For the hierarchy regime the imposed rules are the main co-ordination mechanism. For the network regime the trust is the main co-ordination mechanism.

3.6 How should property rights be delineated and assigned to improve market efficiency?

“Economists do not only study how people use scarce resources in order to produce things which they want but go further by asking: is the way in which scarce resources are used a good way?” (Needham, 2006, p.52-53)

So society is faced with a decision: what kind of rules do we want the state to make as a framework for the individual choices on the use of scarce resources or to put it in the perspective of the new institutional economics theory: what is the best governance structure? Welfare economics, in seeking an answer to this, has produced the idea of Pareto-optimum (see p. 26). However, there is a lot of criticism of Pareto-concepts. The opponents pointed out that in a complex world with incomplete knowledge, there is no such thing as one Pareto-optimum; there are many of them and even a world with complete knowledge would have many Pareto optima (Van der Krabben 1995, p.75). The Pareto-optimum concept has no meaning in an uncertain world since it cannot be established whether or not such an optimum has been reached. Of course, if loosely defined, the concept of Pareto optimum can be used as a norm for acquiring a ‘better’ situation for the majority concerned, but in that case mathematical precision is lacking. The use of such a concept in choosing policy instruments for any problem, including issues related to land market functioning, could be misleading if it were to be used as an exact standard. For criticism of Pareto optimum concept see also Needham (2006, p.54).

The superiority of rights and the overall balance of rights in the framework within which land development is taking place, evolved over time differently in many countries. The intellectual background for discussing the difference did not remain unchanged either. Friedmann (1987) presented and discussed the history of the intellectual influences on planning theory and distinguished four major traditions of planning thought: social reform, policy analysis, social learning, and social mobilization (Fiedmann 1989, p. 11-12). Healey (1997, p.10-28) discussed three strands of thought which influenced the culture of spatial planning: economic planning, physical development, the management of public administration and policy analysis⁵¹. All these traditions influenced the approach to planning and therefore the current discussion about the right balance in rights, as Healey (1997, p.28) pointed out:

“All these traditions, as they have evolved, provide pointers to the development of institutional analysis”

⁵¹ See also Boschma & Lambooy for discussion about the long term evolution of spatial planning systems using notions of path dependency within evolutionary economics

Consequently, it is difficult to explain the nature of urban planning and development⁵² in a market economy and therefore balance in rights in the framework for land development. Furthermore, transaction costs economics can be taken into consideration while discussing the particular model of coordination, as Buitelaar (2002) put it:

“Transaction costs economics assumes that choice of one structure above another depends – when all other variables are equal – on the nature of the transaction and the costs that result from it.”

In this sense many researchers used the concept of efficiency assuming that the most efficient means of delivering the desired outcome⁵³ is at least cost. For example Alexander (2001a) is comparing the transaction costs between alternative institutional arrangements, assuming that the output and all other circumstances are constant. He assumes that the arrangements that produce a given output with the least transaction costs are the most efficient. (Buitelaar 2007, p.174)

Buitelaar (2004) applied transaction cost economics into the study of the land development process. He proposed the concept of user rights regime, which consists of property rights regime and spatial planning regime at a national level and location-specific applications. He distinguished the elements of the user rights regime in the development process and argues that the user rights regime is used and (partly) created in a development process, which involves cost⁵⁴. Further he made an attempt to evaluate the different property systems, to find which are better. He compared from a transaction cost economics perspective the efficiency of the development process by comparing the cost of different institutional arrangements. Creation and use of institutions involves the institutional cost (specific concept of transaction costs⁵⁵). However, the measurement of transaction cost does not provide necessarily satisfying results. Institutions can move towards the lowest transaction cost – i.e. efficiency, but the view of the efficiency may differ between the developers or other groups of people involved in the process. Also the identification of cost remains very questionable.

Buitelaar (2004) concluded that in an investigation concerning different regimes a conclusion would not likely be as follows: *“the creation and use of regime A is more efficient than that of regime B”*. Instead of the often-heard argument that the market is more efficient than the government in co-ordinating changes in land use, he saw that the analysis could lead to an assertion like: *“in stage X, regime A involves fewer costs than regime B but, in stage Y, it is the other way around. And regime A is more efficient for agency K, while regime B is more efficient for agency L”*.

⁵² Planning itself is a subject of paradoxes, as Webster (2005) pointed out, for example, paradoxes concerning the involvement of plurality of actors who made the independent decisions and yet need both certainty and also flexibility at the same time

⁵³ *Desired outcome means control of externalities and co-ordination of infrastructure and land development, public and private goods. See also Dawkins 2000*

⁵⁴ It is different from the approach in this study that the land development is influenced by the institutions which are not created which involved costs but already existing and matter. Depending on the institutions and the way they delineate the property rights over land, the methods of land development process differs.

⁵⁵ Transaction costs are understood as all costs that are different from the production costs in a neo-classical economic sense. These costs emerged because of bounded rationality, incomplete information and opportunism (Buitelaar, 2007, p.30)

In an economic sense most efficiently mean at least cost. However, in relation to land development Buitelaar (2004) argues that the institutional arrangement with the least transaction costs should not always be chosen, as he puts it:

“Sometimes it is appropriate to incur transaction costs in planning for the longer term benefits that it can bring to society through a better way of using land”.

Buitelaar (2007) also shares the criticism of using the transaction costs theory as an explanatory theory for institutional change, as he puts it:

“The quest for reducing transaction costs as a determinant for institutional change, or even more broadly, as determinants for emergence and evolution of cities (Webster & Lai, 2003), as often assumed, remains unproven and seems to be only part of the explanation of the emergence, continuity and change of socially constructed institutions”. (Buitelaar, 2007, p.8)

However as he pointed out, following Williamson (1993) the transaction cost economics *“is an interesting analytical tool to investigate and compare institutional arrangements in theory and practice”*. Buitelaar, (2007, p.8)

Therefore, the results of such application are not promising in determining the best governance structure for land development. Furthermore, can efficiency and equity criteria, two basic criteria for evaluating land-use control systems according to (Ellickson, 1973, p.688, cited in Needham, 2006, p.14)⁵⁶, still be discussed when choosing the governance structure?

According to Needham (2006, p.14) these two criteria should be supplemented by one more third criterion, namely the effectiveness in realizing the policy goals. The criteria of efficiency and equity do not take into consideration the fact that the land-use control system is being applied to achieve certain policy goals. Therefore if the system is a good one or has a bad result, it should be also then measured against the effectiveness in realizing these policy goals.

What follows from this is, that first the appropriate goals of land policy need to be justified and this cannot be determined in general. There will be a lot of goals of land policy which should be separately discussed. Nowadays, the concept of sustainability could be taken into consideration as a criterion for evaluation of land policy goals. Although for example, Needham argues that it should not be considered separately from the first three criteria. He argues that for substantive reasons the sustainability is a question of intergenerational distribution and for procedural reason it could be included in the third criterion. (Needham 2006, p.14-15)

Instead of the traditional welfare economics approach, in this thesis I make use of the property rights theory to present a number of possible interventions to solve the efficiency problem in the land development process. According to the property rights theory, efficiency problems

⁵⁶ Economic efficiency and distributional consequences are the main factors for evaluating development outcome in neoclassical and welfare economics.

are caused by problems with the assignment and delineation of property rights over land. Therefore, the problems which appear in land development processes are significantly caused by problems with the assignment and delineation of rights and duties over land during the process. Different partial rights in the property rights regime should be discussed in order to find the possible link to the efficiency problems. But how property rights should be delineated and assigned to improve market efficiency, i.e. to reduce externalities. How to settle the right balance of rights if the intellectual background for planning is so different over time? Which approach is appropriate in a given country context? Does the intuitionist approach and in particular the property rights theory respond to the challenge of modern urban planning and how it responds? What are the current 'state-of-art' theories in new institutional economics?

First of all, following Lai (1997) and Needham (2006) I argue that the choice between the assignment and delineation of property rights depends on the context and cannot be determined in general (see also Rob, 1998). Consequently, whether the particular assignments are appropriate should be case specific, i.e. specific to selected efficiency problems.

Webster and Lai provide an answer to the question of how any particular assignment of property rights may be judged as being less or more efficient: *"the technical answer to the question is founded on common sense: rights to a resource should be assigned to those in the strongest position to influence the resource's contribution to the desired outcome"* (Webster and Lai, 2003, p. 8). For, *"assigning property rights over a resource makes the resource owner a residual claimant of benefit (use and income) generated by that resource and encourages efficiency – increased efficiency means private gains"* (Webster and Lai 2003, p. 9). Concerning the efficiency of urban development processes, they have developed four propositions about the evolution of property rights and the efficient division of ownership in the pursuit of some collective goal (Webster and Lai 2003, p. 11-12):

- *Subdivision rule*: if the value of a resource rises, or the cost of assigning property rights to a valued resource falls (due to technological or institutional innovation), then there will be a demand for a reassignment of property rights;
- *Combination rule*: property rights will be combined if the transaction costs of co-ordinating resources use via organisation and planning are less than the costs of co-ordination via market transactions;
- *Public domain rule*: a resource will be left in the public domain if the costs of assigning property rights over it exceed the value thus created;
- *Subsidiarity rule*: the total value of a contract or of any collective action is maximised when agents with an ability to influence the value of the contract or the outcome of collective action bear the full effects of their actions. This will be achieved when agents have a residual claim on the benefits created by the resources that they influenced.

In addition, the compensation rule of Van der Krabben (2009) refers to government intervention based on a property rights approach and it was applied to the retail market. According to Van der Krabben's compensation rules, a negative expected effect of peripheral retail development should be compensated by retailers of the peripheral retail location to the town centre retailers. Therefore property rights should be assigned over to the negative trade effects. The extent to which compensation must take place depends on the size of the trade effect.

How could the suggested solutions be implemented? The two types of possible interventions should be distinguished: interventions, which aim to *structure* the market and the traditional interventions which are meant to *regulate* the market. The distinction between structuring the market and regulating the market has been introduced by Needham (2006).

Needham (2006, p.13) introduced the distinction between the two different ways in which society can try to achieve the desired land use:

“It can create and structure rights in land in such way that the desired land use is achieved by people working freely within that structure. Or it can influence, or steer, actions in the market in rights in land so that the outcome of people acting in that market is a desired one. And society can, of course, do both at the same time, so that the one complements the other. The argument from economic efficiency is: use that way, or that combination of ways, which uses scarce resources most efficiently.”

Table 6. Structuring markets versus regulating markets. Author’s presentation based on quotations of Needham 2006 p.12-13

Structuring markets	Regulating markets
<i>The market is structured by the law maker creating rights and determining the rules about the way in which they may be used and traded.</i>	<i>The law maker can authorize state agents to take action – such as forbidding certain types of development in certain locations, such as giving subsidies or levying charges, such as publicity campaigns to persuade people. In the extreme, those actions can go beyond influencing: a state agency might be able to bypass the market by compulsory purchase or pre-emption</i>
<i>The law maker can let the market – the social traffic in property rights – do its work. People working freely within the structure of rules.</i>	<i>The law maker influences or steers the way in which people act in the markets in rights in land</i>
<i>Structuring sets the rules of the game for those who want to play it.</i>	<i>Regulating imposes rules on all, whether they choose to play or not.</i>
<i>Creating and structuring rights in land and setting up markets in them</i>	<i>State agency can change the way in which land is used, either by passive regulation or by active involvement in projects. Passive regulations contain two ways: by prohibition (essence of statutory planning and ordinances) and by incentives. Influencing by incentives includes financial incentives – subsidies, fines, liability to pay compensation – and exhortation, appealing to a sense of duty, changing perceptions, mediation, planning agreements, getting people to ‘internalize’ collective values, etc. An example of active involvement in bringing about the desired change is building an estate of affordable housing or a road or a bridge, etc.</i>
<i>Private law rules</i>	<i>Public law rules</i>
<i>When people interact within a framework of private law, the land use that comes about has been determined by “the market”</i>	<i>The land use can be influenced in addition by a state agency regulating those individual actions by the use of public law</i>

Needham (2006, p.13)⁵⁷ argues (if all other things are equal) for the structuring of markets instead of regulating them. The reasons, as he puts it are the following:

“It is recognized that the exercise of a right is restricted by the market rules. But at least the parties involved have the freedom to decide whether or not to enter into a transaction in that market. Regulation, on the other hand, influences how people may operate within the rules, and can restrict people in the exercise of their rights in an additional way, a way – moreover – which people cannot avoid by deciding not to take part in a transaction.”

Webster and Lai (2003) argue that “*human endeavour may be co-ordinated by top-down, hierarchical planning or by a bottom-up and more spontaneous approach that relies upon symbiotic exchange*”. Planned order happens within firms and within groups of firms in markets. It imposes and centralises co-ordination via organisations and assumes that society is ‘mathematically manageable’. Spontaneous order assumes spontaneous and decentralised co-ordination, which happens in systems of voluntary exchange such as bartering and modern markets. Spontaneous order applies to two distinct processes. First, it is the ability of markets to adapt to changes in demand and supply without central planning. This includes the market’s ability to reassign property rights in response to changes in resource value. Second, the political market’s ability to adapt to changes in demand for collective action. Well functioning liberal democracies are responsive to voter demands and there can be spontaneity in the way that policy follows demand that is analogous to the spontaneity of markets. Spontaneity in markets relies on the clarity of prices in signalling information about demand and supply. Spontaneous markets require responsive governments to create legal environments that support innovation, competition and private wealth accumulation.

3.7 Recapitulation

This chapter presented the crucial elements in the property rights theory, which can be used in further analysis of land development processes. These elements discussed above refer to the identification of the importance of the partitioning, delineation and allocation of property rights in land development processes. Therefore, property rights theory can be used as an analytical tool. This chapter discussed also the property rights theory in a normative way.

Theoretical explanations are beneficial in this study for many reasons; I would like to mention at least three. First, the property rights theory provides the elements which can be used in an analytical model, and which I do not have to invent myself. Attention to the distribution of rights and duties during the land development process is justified. Secondly, a theoretical base gives explanations why something could be wrong or right. If I want to improve the outcome of the market process then the property rights theory gives me the potential clue on how to improve it (although there is no one unified approach to the emergence of property rights as explained above and no agreements about the evolution of property rights regimes). This

⁵⁷ Needham took the stance of the liberal tradition in the sense of Ogus (1994, p.46): “*respect for individual liberty and acceptance of the distributions resulting from market processes, tempered with a concern for unjust outcomes*”. The evaluation of the results should be based on three criteria: economic efficiency and equity as well as the effectiveness with which the land-use goals chosen by the appropriate state agency are being met.

potential explanatory power has to be of course tested. And finally, without theory the comparison would be difficult to manage. The property rights theory gives me the background on how to identify the potential explanatory variables, which I can use as a starting point when building the comparison raster and which also limit the scope of the research.

In this chapter, the concept of the property rights regime was introduced. The property rights regime consists of public law rules and private law rules in relation to land. Examples of public law rules include planning law, expropriation law, and tax law. In the next Chapter I will try to find factors, which create the basis for discussing the difference in this complex system of public law rules applied to land development process. The next chapter is again a result of a literature review. In this case concerning public law rules, which constitute the property rights regime in relation to land development in an international context. I will put into operation the concepts used in the previous and following chapter in Chapter Five.

Chapter Four

THE SIGNIFICANCE OF FORMAL RULES FOR LAND DEVELOPMENT

This chapter aims to explore what the international variations in the balancing of rights in the property rights regime are and how different balances in rights influence the characteristics of the land development process. Literature shows many empirical studies, which include in their scope the delineation and allocation of rights in land development but do not use a clear theory of institutions or property rights. They are related to institutional analysis and property rights theory but very often without a theoretical background provided in the study. The focus in this review is on formal rules (public law rules). When discussing the formal rules, the attempt is to present fundamentals, which can be further used in developing the analytical framework for land development.

4.1 Main conceptual land market systems

4.1.1 Plan-led versus development-led systems

Different rules applied to land and property markets in European countries have been broadly described, for example in international comparison studies of Dransfeld and Voß in 1993⁵⁸. This study has indicated the substantial differences that exist in an international context with respect to the functioning of the land and property markets. Dransfeld and Voß (1993) researched the land and property market with a subdivision to framework, within which the market is functioning (conditions), market activity (process) and market results (outcome). Although it was not indicated that this study is about institutions, in fact it is exactly that. Conditions of the process mean the individual elements that influence the process (rights to land and their registration, planning system, finance system, and limitation to the operating of the system, actors). Conditions create the institutional framework. The market activity was presented in the form of models of changes on land use, and the process by means of which building land becomes available, by interaction between the individual elements, and by roles of various players. Finally market results refer to transactions, prices, and evaluation of space development. (Dransfeld & Voß 1993)

⁵⁸ Dransfeld and Voß (1993) coordinated the study of urban land and property market in Germany, France, the Netherlands, United Kingdom and Italy. The project was known as the EuProMa Project and was commissioned by the German Federal Ministry for Regional Planning, Building and Town Planning and was undertaken at the Faculty of Spatial Planning of the University of Dortmund, Germany, under the direction of prof. Hartmut Dieterich. The central objective of the EuProMa Project was to prepare detail accounts of the operation of the urban land and property markets in five major EC economies. Adopting the same framework and structure Sweden too was investigated (Kalbro & Mattsson, 1995).

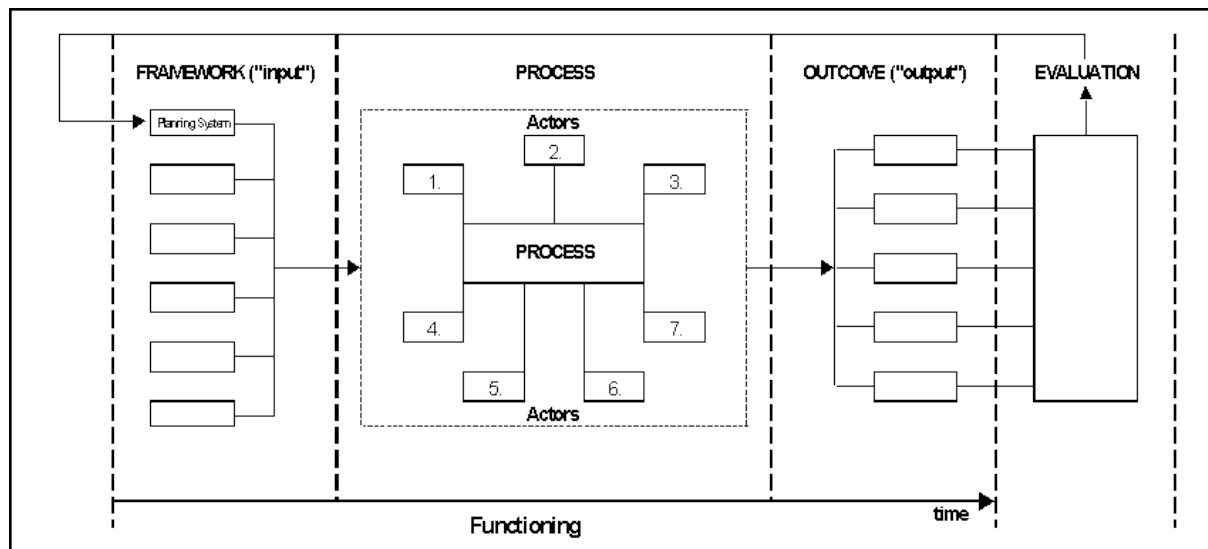


Figure 4. Functioning of the land market – theoretical model⁵⁹. Source: Dransfeld and Voß (1993), Dransfeld (2001 p.1)

Qualitative descriptive research concerning different rules of operation of land and property markets, like the research of Dransfeld and Voß (1993), lead to a different interesting conclusion about the systems of rules. Authors distinguish between two main conceptual property market systems, market-led and plan-led systems. However, I prefer to use the distinction between a discretionary system and a system based on legal certainty, or: development-led vs. plan-led. Market-led seems to me an inaccurate form. This distinction between a discretionary system and a system based on legal certainty originated from the planning theory (Faludi 1973, 1987, p. 185-192). The ground on distinguishing between these two systems is the legally binding nature of the content of plans at a local level. The plan-led system is strongly regulated. Development-led allows for more discretion in decision-making. Both systems can provide satisfactory market results. According to Dransfeld & Voß (1993) exert on land and property markets are much greater where the content of plans is legally binding. However, this finding is not certain in today's context of cooperation and governance. The general difference between two conceptual systems: development-led and plan-led are presented in summary in Table 7.

⁵⁹ It can be seen from the model that the results of the evaluation can have an influence on the creation of the framework, within which the market functions. Therefore it is assumed that institutions are endogenous to the system. It is a learning process. There is an obvious relation between Jütting's (2003) analytical framework for institutional analysis and those presented by Dransfeld and Voß (1993).

Table 7. Development-led and plan-led systems – conceptual differences

<i>Conceptual Development-led System</i>	<i>Conceptual Plan-led System</i>
Emphasis on discretion and flexibility	More attention to the protection of property rights and legal certainty
Advisory, flexible system based upon negotiation and bargaining	Binding system
Advisory plans	Binding plans
There are material considerations which can override the local plan	Local plan is binding on all citizens and public authorities
A degree of flexibility within the development process	Certainty within the development process. Legal certainty for developers when proposals are in accordance with the local plan
Separate Planning permission required	Building permission only
Conditional permissions. Material consideration that have to be taken into account when applying for a planning permission (however not open-ended consideration but based on policy guidance and jurisprudence)	The imperative development control system (a limited and known number of conditions, which must be satisfied). If application meets conditions, permission has to be granted. No other conditions can be raised.
Conditions can be imposed on planning permission	Restrictions of someone's right to use land must be presented in the land use plan
Planning obligation discussed before issuing of planning permission	No obligation discussed with regard to land use before issuing building permission
Appeal system of plans based on arbitration over the planning merits of an individual scheme	Appeal system based on administrative errors

The UK is a country representing the market-led system. However, detailed approach to discretion aspects has evolved in time⁶⁰. The modification of the planning legislation of 2004 replaced some elements of discretion of local authorities and introduced more legal certainty (Webster 2005).

For the plan-led system, the Netherlands is often taken as an example. However, nowadays the Netherlands is moving in the direction of incorporating more market-oriented instruments in the land market. The new Spatial Planning Act scheduled for 2008 allows for more development oriented spatial planning (Janssen-Jansen *et al.* 2007). In practice there is no clear system, which is built as plan-led or development-led in any country. In different

⁶⁰ For example the urban policy of the 1980s assumed that a greatly reduced level of town planning control and bureaucracy would encourage greater levels of private sector development activity, notably property development, which introduces new housing and jobs. Three main principal policy areas include Urban Development Corporations (UDCs), Enterprise Zones (EZs) and Simplified Planning Zones (SPZs). This was an attack against local government planners and an innovation in town planning control in 1980s. At the same time a variety of financial incentives was introduced in order to attract investments. (Ratcliffe & Stubbs 1996)

countries there is a mix between these two extremes in relation to different areas (sectors) of urban development.

Planning law refers strongly to land law. The planning law in the UK and the Netherlands, which represents the two theoretical different systems, has different origins. The British property rights regime is associated with the feudal and common law tradition. The property rights in this system has not been clearly codified and defined. Therefore, there is a need to solve the disputes concerning property rights while discussing the planning issue. The 'British' family of law is characterised by a case by case (evolutionary) approach. Needham (2006, p.34) explains the 'British' family: "*The Anglo-Saxon tradition is based on the feudal 'doctrine of estates': an estate is an interest in land, which can be defined by and defended at law. (...) In the Anglo-Saxon tradition, it is not the resource which is owned, but the rights in that resource: those rights are property.*" On the other hand the absolute ownership in the Netherlands is based on Roman law tradition, called the 'Napoleonic' family⁶¹, which is also known as the 'rule of law' family. In the 'Napoleonic' family there is a system of rules, both in private and public law⁶². (Buitelaar 2007, p.61-62, 83-84, see also Needham, 2006, p.34-35)

Recent research of the planning system of several Western European countries (UK, The Netherlands, France, Germany, Italy, Flanders, Denmark, Sweden, Spain/Valencia) made by Gielen (2007) shows that the classical classification of differences in Western European planning systems does not fit fully with the real world. Gielen (2007) concludes "*almost all the studied countries show very similar characteristics as the British 'development-led' system*". In the early stage of the development process he distinguished between two groups of countries, which show similar characteristics. One group offers "*some degree of certainty beforehand*". It means that municipalities are obliged to approve binding land-use plans that have to cover the whole municipal territory and in this way constitute the frame for the land development process and some level of legal certainty (Spain, as well as France and Italy to a certain extent). In the other group of countries, in the early stages in the development processes there is much "*uncertainty beforehand*". There is no legally binding plan, which designates the future use possibilities of the land. English Development plans, Dutch Structuurplan, German Flächennutzungsplan, Swedish översiktsplan, Flemish Ruimtelijk Structuurplan and the Danish Kommuneplan as well as the Italian Piano Strutturale are the plans which are not legally binding. Therefore their role is only indicative and gives no legal certainty about future development frames. In the so-called development moment when the development initiative is indicated by the developers, the process of negotiation starts. Gielen (2007) argues "*once these negotiations turn out successfully into agreements, in all the studied countries detailed binding land-use plans for specific areas are approved*". (Gielen 2007)

⁶¹ To this family belong also France, Belgium, Spain, Portugal and Italy.

⁶² *The Continental tradition (which includes both the Napoleonic and the Germanic legal system) starts with the concept of the 'full ownership' of thing. Ownership cannot be defined as a finite list of concrete rights over that thing, for ownership is of all possible rights, even those not yet thought of. The person with the right of full ownership might be entitled to split off certain rights, which are then exercised by others: those others do not own those rights but are merely authorised by the owner to exercise them. (...) In Continental legal tradition, it is the thing itself which is the property and which can be owned. If the owner of the thing splits off a right and authorise someone else to exercise it, it might be possible for that person to trade that right: but that right is not property.* (Needham 2006, p. 34)

Buitelaar (2007, p.2) pointed out that the recent trend in spatial planning systems is to cut rules and bureaucracy and to streamline procedures for land use planning. This concerns the changes in spatial planning systems in both countries representing different poles in classical categorisation. This trend is present in other countries too, as Buitelaar (2007, p.2) puts it:

“More privatisation, more market, less bureaucracy and fewer rules are phrases that can be heard on a regular basis in almost every democratic country. In the US and the UK, this discourse took off significantly in the late 1970s and early 1980s when both Reagan and Thatcher came to power. In continental Europe it generally emerged a few years later”.

It could be summarised that in between purely plan-led (hierarchical) and development-led (competitive) systems we often have a model that emphasizes the role of negotiation and public-private partnership, to avoid tensions in decision making involved when establishing plans and lower level building regulations (Nijkamp *et al.*, 2002). Kauko (2003) pointed out that between two ideal approaches emerges a broad approach, where an interactive network of actors determines the outcome. This refers also to the general understanding of the idea of spatial planning. Kauko (2003) continues that in today's changing European context the whole idea of spatial planning has undergone some marked changes from formal and legally binding documents to project-based settings, where the outcome much depends on the interest, negotiation skills and power position of actors. This argumentation influenced the choice of the methods of land development, which will be the subject of inquiry in my research.

The elements of distinction between the two conceptual systems relates to the distribution of rights in the framework for land development process. The main variations concern an approach to development control. Some systems maximise flexibility (development-led) and others maximise certainty (plan-led). Therefore when discussing the fundamentals for the analytical framework for studying land development, these distributional characteristics should be taken into consideration.

4.1.2 Four traditions of spatial planning in Europe

The EU Compendium of Spatial Planning Systems and Policies (1997) (further CEC 1997) distinguished more than just two (development-led or plan-led) conceptual systems. The authors of the Compendium (CEC 1997, p. 36-37) identify four major traditions of spatial planning⁶³ in Europe: the regional economic planning approach, the comprehensive

⁶³ This research will refer many times to planning research, as planning and development process are the twin processes. What is called the framework within the land and property market function (Dransfeld & Voß, 1993) in one literature, is called the spatial planning system in another. In the Compendium 1997 spatial planning is referring to: “Methods used largely by the public sector to influence the future distribution of activities in space. It is undertaken with the aim of creating a more rational territorial organization of land uses and the linkages between them, to balance demands for development with the need to protect the environment and to achieve social and economic objectives...” Spatial planning systems according to the definitions adopted in the Compendium (1997) means the various institutional arrangements for expressing spatial planning objectives and the mechanisms employed for realizing them. Therefore it relates to what in this research is called ‘institutions

integrated approach, land use management and urbanism. First, these traditions will be explained and then the factors from the scope of the property rights regime behind the categorization will be discussed.

In the regional economic planning approach, the formation of spatial strategy to underpin spatial policies is the main issue. In this tradition central government inevitably plays an important role in managing the development pressure across the country, and in undertaking public sector investment. The regional policy objectives, especially in relation to the disparity of wealth, employment and social conditions between different regions of the country's territory are the dominant characteristic of spatial planning. To this tradition belongs France, and to the lesser extent Portugal. (CEC 1997, p. 36)

The comprehensive integrated approach is essentially relying on regulation, associated with mature systems. To this tradition belongs the Netherlands, the Nordic countries, Austria and Germany⁶⁴. Spatial planning in this case is conducted through a very systematic and formal hierarchy of plans from national to local levels, which coordinates public sector activity across different sectors, but also focusing more specifically on spatial co-ordination than economic development. This approach requires responsive and sophisticated planning institutions as well as mechanisms and considerable political commitment to the planning process. The norm in this case also is that the public sector investment is bringing about the realization of the planning goals. There are two sub-categories: the Nordic countries approach and the Austrian and German approach. Nordic countries follow the tradition, where considerable reliance has been placed on a rational planning approach and public sector investments. In Nordic countries local authorities have played a dominant role, albeit sharing responsibility with central government. Also in Federal systems in Austria and Germany, the regional governments play a very important role too. (CEC 1997, p. 36-37)

The tradition of land use management planning is more closely associated with the narrower task of controlling the change of use of land. The main examples are the UK, but also Ireland and Belgium, although the latter two countries are moving to more comprehensive approaches. In the tradition of land use management, local authorities undertake most of the planning work, but the central administration is also able to exercise some degree of power. (CEC 1997, p. 37)

Finally, urbanism is defined as a tradition, which has a strong architectural flavour and concern with urban design, townscape and building control (the Mediterranean Member States). In this group there are rigid zoning and building codes. There are also a multiplicity of laws and regulations but the system is not well established, and has not commanded great political priority or general public support. This tradition is less effective in controlling development. (CEC 1997, p. 37)

for land development'. Land development and spatial planning are two mutually connected areas. The analysis of one of these areas naturally involves looking also into the other.

⁶⁴ It is, however, surprising that to the same tradition of spatial planning belong the countries, in which the definition of planning profession and the physical appearance of plans (cartographic representations) and the role of architects versus urban designers and planners differ so much.

In the Compendium (CEC 1997) the considerable diversity in the planning systems through Europe is explained by different combinations of legal, institutional and other arrangements in a country for undertaking spatial planning. According to the authors of the Compendium (CEC 1997) in determining the characteristics of different traditions of spatial planning, some factors play a fundamental role. These factors are especially the constitutional law, government structure and the legal framework, as well as historical and cultural conditions, geographical and land use patterns, levels of urban and economic development and political and ideological aspirations⁶⁵. Therefore, different levels of institutions as well as both formal and informal arrangements play a role in the determination of the traditions of spatial planning. It is evident that there is also a very wide range of instruments used to express spatial planning policy, for example those that are commonly referred to as “plans” as well as a number of mechanisms, which are designed to ensure that plans are implemented. All this creates a very complex framework of rules.

In the Compendium (1997, p.34) the different traditions of spatial planning were defined by eight variables, which were selected to help identify the essential characteristics of a planning system. The variables are: 1) the scope of the system, 2) the extent and type of planning at national and regional levels, 3) the locus of power, 4) the relative roles of public and private sectors, 5) the nature of the systems of law (the legal framework), 6) constitutional provisions and administrative traditions, 7) the maturity or completeness of the system, 8) the distance between expressed objectives and outcomes. Three of the factors play a fundamental role in determining the characteristics of spatial planning systems in the Member States. They are:

- Constitutional law
- Government structure and responsibilities for spatial planning
- The legal framework (CEC 1997, p.37)

The factors refer to “rules of the game” from Williamson (2000) level 2 of institutional analysis. Constitutional law⁶⁶ often establishes the essential characteristics of spatial planning. In some countries the constitution defines individual or government specific rights and responsibilities in relation to development, land ownership and property. These rights in turn, influence the organization and priorities of spatial planning. The constitution also establishes the structure of the government and in this way allocates responsibilities in relation to spatial planning. (CEC 1997, p.37)

⁶⁵ Issues connected with the spatial planning are considered to be important for the economic and social cohesion of the Union. The increased attention concerning cooperation on and through spatial planning has been reflected in several EU and other publications. In 1997 the European Commission published the EU Compendium of Spatial Planning systems and Policies (CEC 1997). This comparative review compares the spatial planning systems of the 15 EU states. The data used in the Compendium is as of January 1994. However, for example Faludi (2002), still expresses a very positive opinion about the findings of this research.

⁶⁶ Examples of the constitutional implications for spatial planning are: the right established by the constitutions in the Netherlands and Spain for a decent home for all citizens. This explains in part the importance that both systems give to housing provision. Another example is the constitutional principle of equal living conditions throughout the country in Germany. This is expressed in the mechanism for redistributing resources between the Länder. (CEC 1997, p.38)

Concerning the factor referring to government structure, it could be noted that each Member State has a unique structure of the government. Broadly, in the Compendium the countries are categorized as federal, regionalized and unitary. In result the role and responsibilities for spatial planning of different tiers of government across the Member States are varying. The authors of Compendium stated: *“The governmental structure and division of powers between tiers of administration has fundamental implications for the organization of spatial planning, especially the extent to which it may be described as centralized or decentralized”*. However, it is very important to note that there is no simple correlation between the structure of government and the real locus power and responsibility of spatial planning in practice. There is also a complex intermeshing of administrative tiers of government with some responsibility for spatial planning. The use of non-elected bodies with specific power is widespread in many Member States. They are bodies, which are essentially decentralized arms of central government, which ensure that state policies and programs can be administered at a more local level. They manage the distribution of resources and other funding mechanisms for infrastructure provision and economic development. These bodies also allow for policy coordination and cooperation between neighbouring local authorities. (CEC 1997, p.41)

In addition it should be emphasised that it is a rather common case that a planning jurisdiction, meaning the power to enact planning regulations in order to prepare land for development, is vested in the lowest level of local government. The Compendium identified the range of authorities within the European Countries responsible for framework and regulatory instruments. In almost all member States the local authorities have the major responsibility for the detailed management of land use change and building control, under the general supervision of the national or regional government⁶⁷. Therefore for the land development process, the municipality's position within the planning system is a crucial point. However, municipality's autonomy can be understood differently. The relations with other levels of self-government, government representations and also private landowners and developers can be understood differently.

The important implications for spatial planning have the legal framework and the complexity of laws, and the administrative levels at which laws can be made. According to the Compendium, three broad categorizations of systems can be distinguished. Firstly, the Member States (the Northern European Countries) that have one fundamental law which provides the basis for the regulation of buildings and the preparation of planning instruments, with a small number of supplemented laws concerning historical monuments, urban renewal and environmental assessment. Secondly, in Greece, Italy and Portugal the planning legislation is made up of a very large number of acts, decrees and regulations which separately make provisions for a specific plan, other instrument or procedure. It is difficult to identify in these cases a unifying legislative framework for the spatial planning system. In these countries there are large numbers of different types of planning instruments for specific situations. Thirdly, the Member States who have established their own legal framework for

⁶⁷ Given the variation in administrative structures there is some consistency among the European countries in the use of spatial planning policy instruments at the local level as a basis for regulating land use and building/development. In all countries legislation provides planning instruments at the local government level which are intended to be the principal tool for managing the land use (CEC, 1997).

planning. There are important differences in planning laws in the groups, reflecting local conditions and priorities. This approach is most pronounced in Belgium, where the regional governments have full responsibility for planning, but also in other Member States where the regionalized or federal government exists (Austria, Spain, and Germany). (CEC 1997, p.42-43)

The elements of distinction between four traditions of spatial planning relates to a wide scope of issues. In my research I will concentrate on the local level. Therefore I do not include an analysis of the differences in the constitutional law or government structure into the scope of the analytical model, which I will develop. Rather I concentrate on the local level and the third from the factors that play a fundamental role in determining the characteristics of spatial planning systems, i.e. the legal framework. However, I would like to develop the analysis into the direction of the distribution of rights and liabilities given by the legal frameworks not the complexity of act of law, which build the system.

The distinguishing factor between the spatial planning systems, which refer to the formal regulatory framework and which I will incorporate into further analysis, is the hierarchy of spatial planning systems, especially the position of the municipality in both dimensions: versus private landowners and versus other levels of self-government and government representations. From the scope of the property rights regime those will be taken for further investigation as important explanatory variables for the existence of different systems spatial planning.

4.2 Attitude towards the problem of the cost recovery, value capturing or planning gain

While discussing the system of public law rules which are significant variables in land development process, it is also important to think about the different attitudes towards the problem of betterment: cost recovery, value capturing (unearned increment), or planning gain. This refers to the integration between spatial planning and financial and investment planning, and also leads to the economic right in land development.

Land can be a subject of taxation on a par with other items whether in the context of local property taxation or of national taxation of income or capital gains (Prest 1981). These taxes are obligatory by nature and act as regulatory instruments. But land can also be a subject of the taxation at rates differing from those on other elements and also some taxes may apply only to land. There are also special taxes on land concerning in general levies on increments in land value. Taxing away the increments in land value is a great topic of discussion by economists. Land use plans affect monetary value of land. As the land value rises, owners through higher resale prices can pre-empt the increases. If an owner undertakes no capital improvements on a property, this resale profit from the landholdings is a pure speculative gain. However, the increase in land value can be captured at least in part by the public sector. (Gihring 1999)

More than one hundred years ago Henry George in his most famous book “Progress and Poverty” discussed questions concerning land use and taxation. George was aware of relative inequality of economic opportunity because of the diminishing access to land. He was a classical economist who believed that competitive markets and private property rights

encourage efficiency and productivity by systematically rewarding producers for meeting consumers' needs at the lowest possible cost. However, he also realised that land has a special characteristic because its supply cannot increase and the landowners tend to grow wealthier regardless of their investment into land. He proposed a solution to that dilemma. According to George the proper balance between private property rights and public interest in land will be achieved by taxing away the value of land produced by anything other than private efforts. Such a solution would keep private landowners from unfairly capturing the benefits afforded by natural resources, urban location and public services. George also believed this single tax would force landowners either to put their land to its economically "highest and best" use by themselves, or make it accessible to someone who would. (Brown 1997)

Global land use and taxation issues have become much more complex since the time of Henry George because the world has become radically different. The introduction of zoning, planning, and permitting since the time of Henry George makes it difficult to draw a precise line between privately and socially created value of land (Harriss 1997). In other words there is difficulty in separating and measuring the public and private components of land value (Youngman 1997). It may even be impossible to disentangle these two sources of value completely, as changing technology and social norms create new forms of properties (Youngman 1997).

However, in general the issues of public fairness and private productivity that Henry George identified more than a century ago are still critical today and have much to add to the ongoing debate over land policy and taxation issues (Lincoln 1997). An ethical argument for capturing publicly created value from private owners is still valid believes Brown & Smolka (1997). Doeble (1997) argues that the formerly socialist countries provide ideal laboratories for testing Georgist ideas of the state's right to participate in the increases in land value that occur from industrialization and rapid urban expansion. Henry George was observing the phenomena of rapidly rising land values and land speculation in the nineteenth century Gold Rush in San Francisco. The same phenomena of rapidly rising land values, land speculation and the active manipulation of land markets by both private and public interest occurs after a collapse of communist government in major cities of the former Soviet Union and Eastern Europe. The debate surrounding these problems raises the same moral, intellectual, and economic consideration that was first laid out in "Progress and Poverty". (Doeble 1997)

Introduction of land taxation proposed by Henry George⁶⁸ had no constituency in capitalist developing countries (Doeble 1997). The system of taxation was not supported by traditional landed classes who to the contrary used their political power to assure the creation of the institution favourable to their real estate business (for example provision of infrastructure in areas where they had landholdings, the preservation of a complex and archaic system of land registration, the passage of subdivision and building codes that imposed impossibly high standards for lower-income making it difficult for them to construct legitimate buildings, and

⁶⁸ Henry George was an advocate for taxing away all increments of land value. He argues that all value was the result of the existence of the community; so all value should be captured. Henry George proposed a single land tax arguing that this kind of tax is not only fair but provides also following social benefits: sustainable public finance by generation of enough revenue to cover all public expenditures, economic growth by replacing other taxes that reduced productivity and efficiency and third, reduction of poverty by increasing the land available for use and decrease land speculation. (Brown & Smolka 1997)

preservation of banking systems that effectively limited credit for land development. The emerging middle class who invested in land and looked to secure this investment by avoiding any substantial taxation in order to help consolidate their new wealth was also not supporting the system of taxation. Also the poor were not in favour of the taxes on real property because they could not afford to pay and they were not tied to immediate and equivalent benefits for the taxation. The central government also preferred to finance the local authorities and services by subsidies and subventions in order to control them. The central government preferred to use “special assessment districts”. In the late 1980s the decentralization of public decision making to regional and municipal levels lead to the need to create local sources of finance. The property tax became an important institution for producing decentralised revenue needed to make cities and regions the centres of economic productivity. (Doebler 1997)

Today there is a multitude of taxation policies used to capture portions of land value created by public actions⁶⁹. Henry George attempts to tax all land rent (understood as the excess of price over the amount required to keep the resource in use). Land taxes today have so far been implemented in a limited way. Therefore the mechanisms for value capturing are more limited than what Henry George would have recommended (Brown 1997). There are conceptual and practical obstacles and controversy in implementation of the idea of value capture. First, it is always difficult to adopt radical changes to land taxes because of the political strength of landowners, who are afraid that new tax might reduce land value. There is also uncertainty about how much revenue the land tax might generate. This is caused by the fact that land value would also fall with higher land taxes. Other obstacles concern the possibility of rising housing prices which aggravate problems of affordability. Another difficulty is separating and measuring the public and private components of land value (Youngman 1997). The problem of how to implement the tax is also complicated by cyclical variations in land prices. One needs to avoid paying the cyclical component of land value. However, to determine at any point in time how much of the land value is due to secular forces and how much is attributed to cyclical variations is no easy task (Brown & Smolka 1997). The question would also be how to pay the tax based on an increased value without selling the land?

Despite the problems of the implementation of even a narrow version of land tax, the land tax has been developed in many new land taxation policies, which attempt to capture a part of the increases in value due to public action. These include for example: the simple use of property taxes, an impact fee and a benefit assessment to the selling of building rights. Also as an attempt to capture back publicly given value are the impact fees or requirements for the developer to offer land for public use due to changes in zoning. (Brown & Smolka 1997)

It seems to be widely accepted and reasonable that a developer should make some form of contribution to the impact of a development proposal. However, how development gain should be captured and distributed (the betterment issue) is still a matter of controversy.

The Uthwatt Report⁷⁰ on the role of compensation and ‘betterment’⁷¹ in a planning system influenced the post-war land-use agenda and brought ideas concerning taxation of

⁶⁹ See Case 1997

⁷⁰ The Expert Committee on Compensation and Betterment (Uthwatt) has worked on the reforming of the British planning system in 1942. The term ‘betterment’ was described as “any increase in the value of land (including the buildings thereon) arising from central or local government action, whether positive, e.g. by the execution of

development profit (Ratcliffe *et al.* 2004). In the UK the planning gain system has been implemented. Planning gain exposes the tensions that exist between the town planning system and the property development industry. Healey *et al.* (1993) stated that:

“For some, planning gain was a legitimate contribution from developers to community development but it has been viewed by others as both an unconstitutional tax and a form of negotiated bribery corrupting the planning system”.

Debate about planning gain concerns the fundamental question of who should pay for the wider environmental impact of a development proposal, the developer (because is taking profits) or the local authority (Ratcliffe *et al.* 2004). Planning gain is often a misleading term. In the British context there are many misconceptions surrounding this subject. Research done by Healey *et al.* (1993) indicated that 12 terms had been used to describe the same function. The understanding of the subject is summarised by Ratcliffe *et al.* (2004):

“The term planning gain provides a convenient umbrella under which benefits in either cash or kinds are offered to a local planning authority (LPA) by a developer, following the grant of planning permission and controlled by an agreement between the local planning authority and the landowner or by planning conditions. This implies a situation in which the local planning authority benefits from something for nothing, that is, by simply granting planning permission the developer will provide ‘sweeteners’ or ‘goodies’ (...). Planning obligations thus bring to the system the very powerful benefits of allowing the developer the opportunity to remedy a planning problem (such as inadequate site access or provision of bus facilities in the neighbourhood) or to enhance the quality of a development (such as the provision of communal facilities like open space for sports use or schools)”.

The Circular Guidance on Planning Gain of 1983 provides the following definition:

“Planning gain is a term which has come to be applied whenever in connection with a grant of planning permission, a local planning authority seeks to impose on a developer an obligation to carry out works not included in the development for which permission has been sought or to make payment or confer some extraneous right or benefit in return for permitting development to take place”. (cited from Ratcliffe *et al.* 2004)

Since 1991 the UK government preferred to use the term ‘planning obligations’ instead of planning gain. Planning obligations refers to the practice of developers contributing either in cash or kind towards infrastructure necessary to facilitate development. The planning obligations can comprise either a planning agreement or a unilateral undertaking. The obligations may restrict the development or use of land and may require specific operations or activities to be carried out on the land owned by the applicant. It may concern the application site or may be on neighbouring land. The obligations must be both ‘necessary’ and

public works or improvements, or negative, e.g., by the imposition of restrictions on other land. This definition is still the most popular and the best known definition of “betterment” in the British literature. (Gdesz 2007)

⁷¹ The term “betterment” was also popularized as “windfall”. Misczynski and Hogman (1979) in their famous book “Windfall for Wipeouts” defined “windfall” as: “any increase in the value or real estate – other than caused by the owner - or by general inflation”.

‘reasonably related’ directly in proportion with the requirements of the site in question. (Ratcliffe *et al.* 2004)

In the UK, the provision relating to planning obligation has existed in the legislation since 1909, however since 1968 the agreements were left for straightforward negotiations between the local planning authority and the developer. There were no exact roles for planning obligations and much was left to the individual interpretations of planning authority. The system was based on local discretion within a framework of policy, established by the government. The planning obligation issues were a subject of a great controversy and an extensive discussion. The public viewed it as just a system of buying and selling of planning permission. It could be summarised that the British system in general and the planning obligations system in particular, are based upon negotiation and bargaining. It is often criticized for this arbitrary case by case approach⁷². (Ratcliffe *et al.* 2004)

Now Planning Gain Supplement (GPS) is being discussed and will eventually replace planning obligation as a remedy for ineffective planning (Gdesz 2007).

The charge for alleviating the impact of a development can take a form of planning obligation, as described above in the British context, or on the other hand for example in the form of impact fees.

In the Netherlands, voluntary cooperation was the principle of participation in the costs of development, however, recently the solutions concerning capturing the unearned increment, were introduced in law. The 40 years of legal uncertainty about type of costs with respect to contracts and taxes on profit came to an end. The new Land Development Act was adopted. It is a supplement to the new Spatial Planning Act and it includes simplified, practise-based regulations for the allocation of the costs of land development. Voluntary cooperation remains the priority but the development contribution was defined also via public law. There are different techniques of recapturing any increase in the value or real estate – other than caused by the owner - or by general inflation developed in different countries. The description of them, however, falls outside the scope of this research. Impact fees will be discussed below as an opposite to planning gain solution. Impact fees are a characteristic for example for the US style. Grant (1993) argues that while impact fees were by no means perfect, they performed far better than planning obligations when measured against criteria of transparency, equity, predictability, and efficiency.

The starting point while discussing the impact fee is that the local government must consider that a need exists for infrastructure. This need is usually associated with estimated growth. The local government planners must therefore estimate growth plans and related

⁷² It could be pointed also that in the British contexts (the absence of any other form of levy or development land tax) the current planning/obligation gain system in fact represents indirect betterment tax. In the history of development of the British planning system there were examples of direct taxation of betterment. The 1947 Act introduced the new system, in which the benefits introduced by the planning system or any other activities of government referred as betterment (any future increases in the value of land) were taxed directly. It means that all of the increased value of land resulting from gaining planning permission was taxed. This tax was abolished in 1953 and return in 1967 when a levy of betterment at 40 per cent was introduced. Subsequently the tax has been changed in 1976 to 80 per cent and finally abolished in 1986 when the system of planning gain was introduced. (Ratcliffe *et al.* 2004)

infrastructure requirements. The impact fees provide the gap between identified infrastructure (and its cost) and existing revenue allocated to local government via taxation. The shortfall in revenue becomes the basis for assessing impact fee. The impact fee can be divided into four categories of infrastructure:

- directly required (such as water supplies)
- providing public services (such as schools, roads, parks)
- providing a social function (such as subsidized public housing)
- providing for maintenance of the whole process (mostly in payment of professional time to devise such schemes) (Ratcliffe *et al.* 2004)

To conclude, the discussion about the different approaches to solve the problem of value capturing the difference between impact fees (infrastructure charges) and planning gain measured against potential benefits is summarised in a rather black and white comparison in the table below.

Table 8. Difference between impact fees (infrastructure charges) and planning gain. Author's presentation based on Ratcliffe *et al.* 2004

Impact fee (infrastructure charges)	Planning gain/obligations
Collected for a specific purpose and may be used only for a prescribed project	Less tightly defined and may be used for a vast array of matters providing that council and developer agree
Based on equality, being applied in a proportionate and fair way	Less clear-cut, with the exact proportion falling on the developer dependent upon individual negotiations between developer and council, and varying on a case by case basis
Simple to calculate and transparent in application. This assists all parties to understand the process and presents a favourable image to the public	Opaque process, sometimes shrouded in private negotiations and the subject of public mistrust
Deemed flexible. The calculation of fee is based on the relative proportion of infrastructure required	Can also be flexible, based as it is on negotiations. Such a benefit of impact fees may also be attributed to gain

From the comparison presented in the table above, it is seen that there are more advantages connected to impact fees. However, it is also argued that the impact fee system would involve greater bureaucracy that currently exists in the UK because of the need to standardize all development types into a shopping list of contributions. In addition there is also difficulty in making such a standardization. However, proponents of changes in town planning in the UK argue that the traditional system instead of being used to finance roads and other physical infrastructure as generated by planning application (i.e. open spaces, schools and sewerage facilities) has been used for matters unrelated to the development in question. The solution proposed by them are tariffs, which involve a schedule of planning obligations, seeking various works and/or financial contributions, which would be prescribed in local planning policy. Therefore the developers would have a 'black and white' list with all levies towards

infrastructure (such as the total or partial cost of a road, school or children's play space necessitated by the development). (Ratcliffe *et al.* 2004)

It could be summarised that the attitude towards value capturing and the betterment levy are important explanatory variables for the different property rights regimes. In the process of land development, the property rights regime allocates the economic rights differently. It can be seen from the discussion above that different legal instruments can allocate this economic right.

4.3 Recapitulation

This chapter presents selective results taken from studies based on issues in connection to the property rights regimes in different countries. The results indicate that it is possible to identify many characteristics of the systems of property rights. In an international context substantial differences can be observed with respect to the rules, which constitute the formal property rights regime framework within which land development is taken place. Therefore it is obvious that the development process differs between the countries. Van der Krabben (1995, p.36) for instance pointed out that: "*variations in real estate development are not exceptions, but rather a sine qua non to urban development processes in an international context*". In the studies presented above, the link was established between the institutional environment and the types of systems of planning and development control. However, the goal was to determine the possible explanatory variables for the different outcomes of the land development processes. Three of the explanatory variables will be chosen for further research. First, the balance between flexibility and certainty in development control (plan-led and market-led regulations). Second, the position of the municipality in the development process. Finally, the allocation of economic right in land development. These three variables are important distinguishing factors when looking at systems in different countries. They also refer to the scope of the property rights regime.

Chapter Five

AN ANALYTICAL FRAMEWORK TO STUDY LAND DEVELOPMENT

The objective of this chapter is to present an analytical model for research on the influence of the property rights regime on the land development process, which is based on the thoughts underlying the property rights theory and initial empirical investigations of property rights regimes. This is done in order to contribute to the further conceptualisation of the impact of institutions on land development process. The analytical model allows discussing the role of the property rights regime in land development and it will be used in comparison between countries concerned in the research. This chapter starts with a summary of the perspective that has been chosen in the present study.

5.1 How land development is viewed in this research

The power of any theory is exactly proportional to the diversity of situations it can explain. Therefore, all theories have limits. Scientific knowledge is as much an understanding of the diversity of situations for which a theory or its models are relevant as an understanding of its limits (Ostrom, 1990, p.24). The institutional theory and institutional economics theory does not build the complete picture of our complex world. Some authors (for example Jütting 2003 p. 33) emphasise that not only institutions influence the development outcome. There are other variables like the local setting influenced by historical trajectories, culture and the behaviour of human actors. Consequently, the behavioural and socio-cultural variables should also be taken into consideration.⁷³

In the previous chapters I have presented the complicated nature of institutional and institutional-economic analysis of the built environment. As it was explained in Chapter Three, there are different definitions and also delimitations of institutions. Any method for undertaking the analysis of institutions should take into consideration the existence of different levels of institutions. This enables a researcher to choose the most relevant level of interaction for a particular question.

In order to summarise how land development is viewed in this research, I will present the institutional model of land development process (Figure 5.). The comprehensive conceptual model of an institutional explanation of property development was presented, for example, by D'Arcy & Keogh (2002, p.23) The authors deal with broad institutional issues at three levels: the institutional environment, the property market as institution and property market organisations. The institutional environment is understood as an institutional framework within which the property market exists. It is defined by the political, social, economic and legal rules and conventions by which the society in question is organised. The property market as an institution is a network of rules, conventions and relationships that collectively represent the system through which property is used and traded. Finally, the third level relates to the main organisations that operate in the property market, the way they are structured and

⁷³ These factors can be distinguished from the institutions. Assumptions concerning human behaviour are preconditions for an institutional approach. However, it is also emphasized by other authors that it is impossible to delineate precise boundaries between behavioural, socio-cultural, and institutional factors (see for example Kauko, 2002, p.35).

the way they change. There is, of course, interactive relation between different levels of institutional analysis. The extension of this model and insights from approach of van der Krabben (1995) formed my perspective to conceptual institutional explanation of land development (Figure. 5).

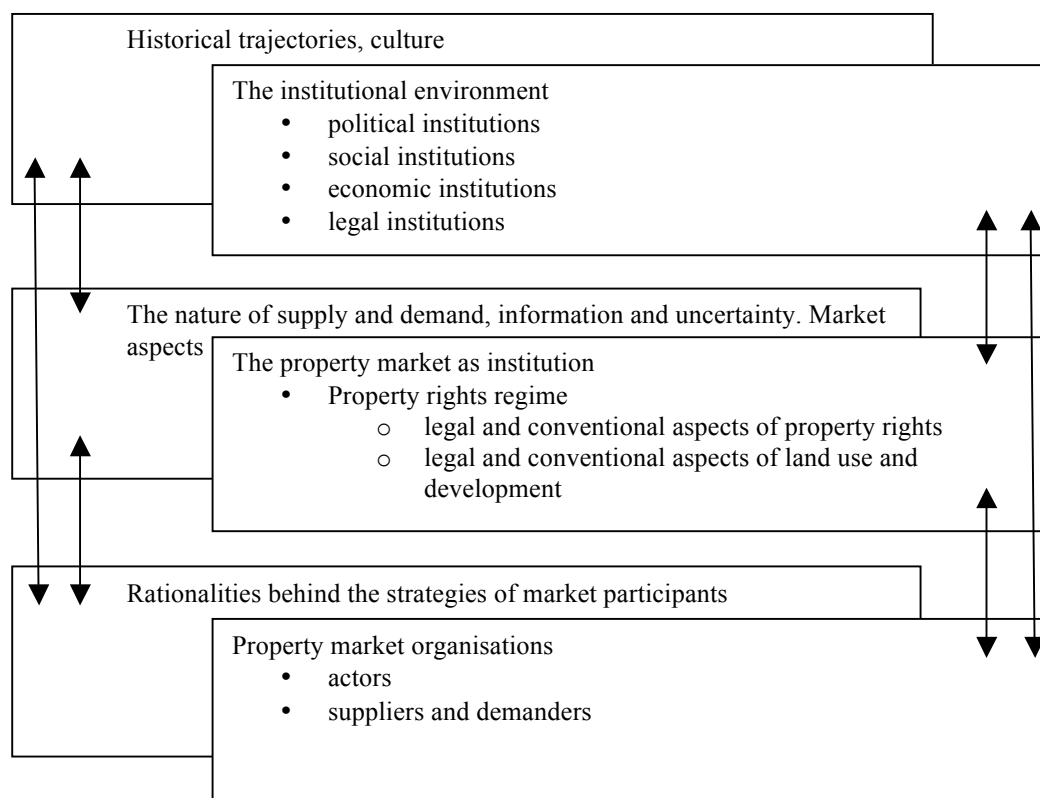


Figure 5. The institutional settings of land and property markets. Based on: D’Arcy & Keogh (2002, p.23) and Van der Krabben 1995

In my research, in general, I will pay attention to the property market as institution. I will try to identify the characteristics of that market as an institution in the process of land development. However, I will concentrate on one selected aspects of institutional analysis, which refers to the formal rules of the property rights regime. I will look at the network of rules within the property rights regime and their relationships with the process of land development. Therefore, in particular, I will look at the property rights regime as an institution.

The informal relations, like norms, expectations, trust, emotions, moral values, habits, non-contractual arrangements are not the starting point and initial focus of this study. However, I will keep focused on how rules are implemented in practice. In addition there are different economic variables which could be added to an analysis. I will try to exclude from the analysis several factors. For the purpose of this research variables such as, e.g., the nature of supply and demand, the rationalities behind the strategies of market participants (therefore the factors related to the rationality of human agents), as well as knowledge (information) and uncertainty problems, are fixed as independent variables. I consider these relations are

significant explanatory variables, as convincingly presented by Van der Krabben (1995). However, I assume that these variables are fixed for the purpose of the analysis made on the selected aspect of property rights regimes. In the present research I will try to discuss the property rights regime in relation to land development. A deeper analysis on one selected level can give valuable insights into further theorizing on the relationships between different levels of institutional analysis.

The ‘old’ institutional approach does not really provide the explanatory power. The assumptions of institutional theory in comparison to neo-classical economics are much more rational, but ‘what’ and ‘how’ drives the choices influenced by the institutions become unresolved. The institutions matter, but still there is no commonly approved alternative for neoclassical theory of price mechanism. The theoretical insights from new institutional economics theory is that in a world of positive transaction costs a comparative assessment of different modes of organizing economic activities is needed because governance structures and legal rules matter for efficiency outcomes according to property rights theory and transaction costs theory (Coase 1937, 1960). The new institutional economics theory assumes, e.g. that human agents act boundedly rational, information problems are characteristic to human behaviour and uncertainty is structural to economic activity. In new institutional economics, given certain preferences, the choice of the governance model will depend on the transaction costs. However, the new institutional economics theory is not the unified body of a research. Emphasis on transaction costs are not followed by all significant contributions to the property rights theory (e.g., Libecap). There is also no general theory of land markets which could be derived from new institutional economics. In addition, actors in the new institutional economics are still not human beings, because they act as rational machines maximising utility within bounds. Therefore, in the present research only some concepts of institutional and institutional-economic approaches will be used, such as institutions, property rights regimes, partitioning, delineation and allocation of property rights. In the present research the transaction costs theory is not applied to land development, neither as a theory nor as an analytical tool (for the application of transaction costs theory to land development see Buitelaar, 2007).

In the previous chapters, I have made clear that the influence of the property rights regime on land development in terms of the property rights theory will receive the most attention in this study. There are several arguments why I have developed my study in the direction of the property rights theory. The new institutional economics theory and, in particular, the property rights theory have directed the discussions of institutions towards the property rights regime. Property rights constitute the typical example of an institution. It is assumed in this thesis that the property rights approach generates a better understanding of the allocation of resources. The property rights theory indicates that property rights are important instrumental variables (e.g. Bromley, 1991, p.5). There is no consensus if the degree to which ownership is established over a commodity’s separate attributes depends on the cost of creating and policing contracts that establish that ownership – that is, transaction costs⁷⁴ - or a political power (Libecap, 1989) or the process of social creation (Needham, 2006) and/or path dependency (North, 1990). However, the property rights theory gives a clear point that there can be many different rights attached to one piece of land and distribution of these rights matter for efficiency outcomes. A resource can also be partitioned among several parties and

⁷⁴ Because e.g. higher transaction costs does not always imply that the property rights will be not assigned

in such a way that those partitions of rights can be aggregated into bundles of property rights (Alchian, 1965; Alchian and Demsetz, 1973). Therefore rights in land can include more than the right of ownership. There is also more than two types of property rights namely: private and public.

According to the property rights theory, the initial allocation of property rights affects what happens with respect to externalities. In real life, transaction costs can never be neglected (Coase, 1960), and therefore the outcome of the negotiations between the interested parties, in the sense of the final allocation of resources, will depend on the property rights distribution. It is the reason why distribution of rights and liabilities within the property rights regime, within which the land development process is taking place, will receive the most attention in this study.

The empirical analysis in Chapter Four demonstrated the significant differences in the distribution of rights and liabilities in the legal framework within which land development process is taking place. In studies which apply the property rights theory to planning and development, it is noticed that the delineation and allocation of rights and liabilities find expression in the outcome of the land and property development process. The nature of, for instance, legal rights, planning rights and other interests in land affects the land use. For example, Needham (2006, p.9) argues: *“if the owner of land has a presumptive right to emit pollution, then uses sensitive to pollution will not locate nearby.”*, *“In Britain, leasehold right may be traded, in the Netherlands not. One result is that business users take a long lease in Britain, if their need for space changes, they can assign the lease to someone else. Business users in the Netherlands, on the contrary, rent for short periods, to avoid the inflexibility of a long commitment, which cannot be assigned to another. A Dutch business user who wants security of tenure coupled with capital growth buys the freehold of the space, for a rental lease brings no capital growth to the lessee. As a result, more commercial space is held freehold in the Netherlands than in Britain. This results in smaller buildings and in the absence of business parks, which are managed as a whole. In both countries there is a market in commercial space, but even without government measures (intervention) and even though the technical and financial requirements of the business users in both countries are similar, the land use is different. The cause of the difference is the difference in rights in land”*. Coase (1988) already pointed out that the initial delimitation of legal rights which relates to who owns the rights in a given location, who has responsibilities, duties, rights, etc. with respect to land, affects the final outcome of market processes. Needham (2006) continues this approach, e.g.: *“If, for example, land ownership in an area is fragmented between many people, it will be difficult for those people to change the use of their land radically, for the use of one parcel is affected by the use of other parcels, and coordination between the landowners is very difficult to achieve. If the land in that area is owned by one person, he has many more possibilities to change the use. If, to take another example, all the land near to a proposed waste disposal site is owned by one rich person, he will be much more able to contest that proposal than if the land which would be affected is fragmented between several poor persons.”*

Therefore, the attention to the assignment of property rights finds its justification. To understand urban dynamics correctly, we must take into account the role of the property rights distribution.

The property rights regime in land, which is constituted by different formal rules in relation to land, specifies who may benefit or be harmed, and therefore, to whom belongs the economic right in land development. From the perspective of the property rights theory, the insecure (i.e. can be appropriated) and/or inefficient allocation of property rights is a potential externality problem. The recognition of this may easily lead to the close relationship between property rights and externalities, and other efficiency problems in the process of the provision of land. This allows presenting the assumption regarding the property rights regime in land development. It is that the property rights regime, the way the property rights are delineated and allocated in land development process, influence the development outcome and relates to all kinds of market failures like externality and public goods and other efficiency problems in the provision of land. Therefore, the property rights regime as a part of the institutional settings of the process of land development, ultimately determines the outcome (the quality and quantity) of the built environment (Figure 5.).

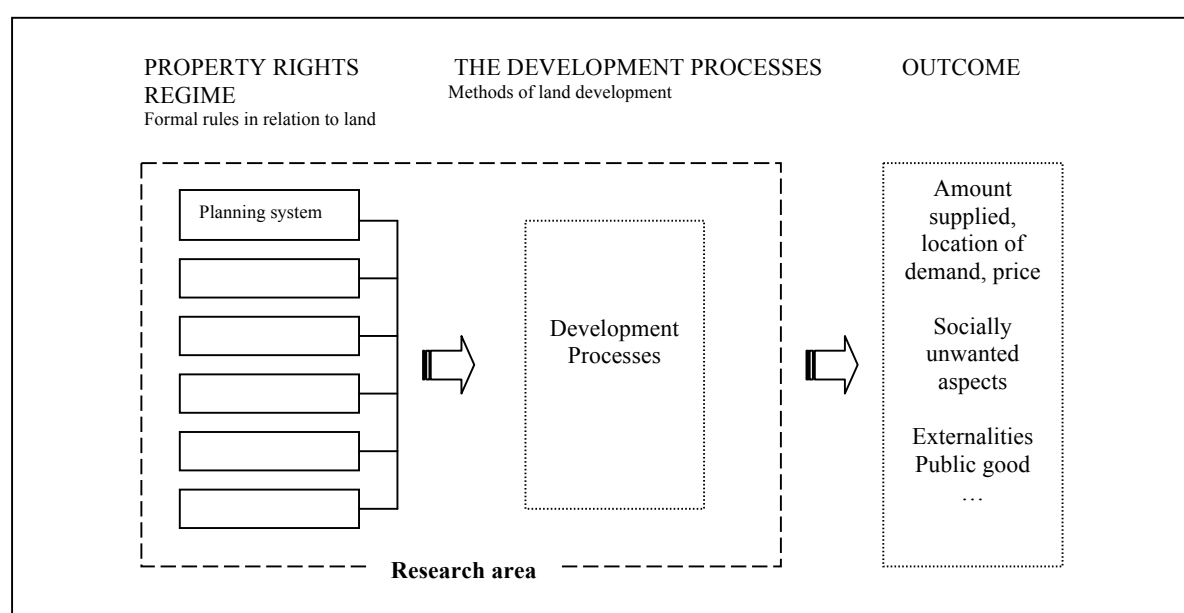


Figure 6. Assumption of the study and research focus

In this study focus will be on the relationship between the property rights regime and the processes of land development (Figure 5.). Rules within the property rights regime are seen as independent variables⁷⁵. Outcome of the land development processes in the form of different methods of land development are seen as intermediary variables in explaining the failures in the development output (the dependent variable). It is assumed that the differences in the delineation and allocation of rights within the property rights regime explain the differences in the land development processes, in the form of the different methods of land development. Different methods of land development can be further linked to problems which result as consequences of certain methods of land development. However, this is not a particular focus in this study.

⁷⁵ Independent only for the purpose of focusing the scope of this research because in practise all rules are social creation.

I believe that the new innovative contribution of my work is to make explicit the link between the distribution of rights within the property rights regime and the land development processes. It is different from the more general, and complicated nature of analysis of institutions in the development process.

5.2 Framework for analysing the impact of property rights regime on the development process

Central in the analytical model adopted in this study, is the concept of rights within the property rights regime. The concept of the property rights regime was introduced in Chapter Three. A property rights regime in land development is defined as an integrated system of property rights connected to land that includes civil law, public law (e.g. planning law) and other types of law (like fiscal law and contract law) influencing the property market, (Geuting 2007). Therefore, it is a complex system of legal rules in relation to land, which can directly or indirectly influence the market performance. These rules in relation to land include legal and conventional aspects of property rights, as well as legal and conventional aspects of land use and development. The property rights regime defines land development structures, which could be more regulatory, cooperative or market like (Figure 7, see also Table 5).

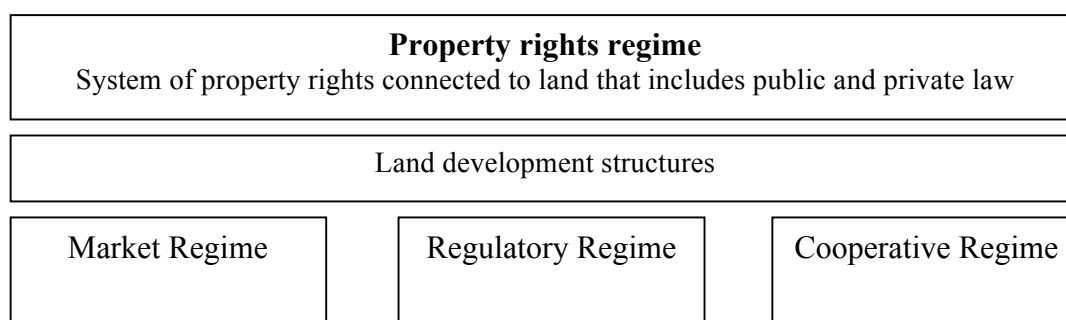


Figure 7. The property rights regime in land development

Property rights are not always legally enforced but include various rights grounded in conventions, culture, relationships, and many other (sociological) elements. Sometimes it is impossible to discuss one without referring to another, and I agree with this. However, in the concept of the property rights regime used in this study, the main focus is on those rules which are legally enforced and further their application in practice.

An approach, which is proposed for discussing the role of the property rights regime in the land development process, can be called ‘rights in property rights regime’. An analytical approach assumes that within a property rights regime, an investigation shall be made concerning delineation and allocation of rights and duties between parties involved in the development process in relation to different aspects of that process. Because the property rights regime is such a complex system built up of many rules in relation to land, this study limits the focus to certain aspects only. When I look at the property rights regime as an institution, I try to identify the characteristics of that institution. Therefore, the characteristics which are possible explanatory variables for the different types of property rights regime will

be identified. In the next step the delineation and allocation of rights in respect to the selected explanatory variables will be investigated further and connected to land development processes. In this way possible links between distributions of rights within the property rights regime and the processes, or problems that appear in the process will be reported. In this research the focus will be on the link between explanatory variables and the processes of the land development.

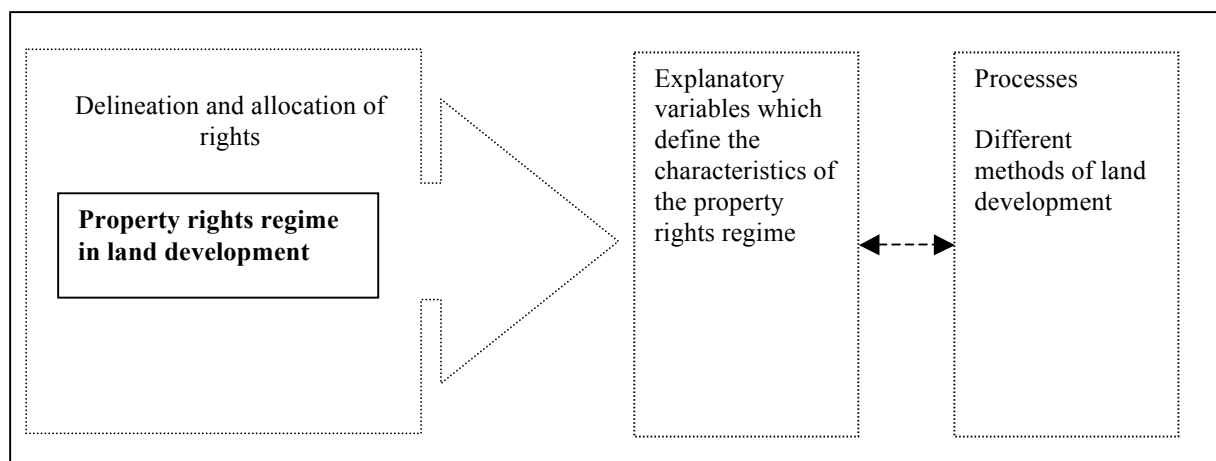


Figure 8. An analytical model to study the role of the property rights regime in land development process

The characteristics of property rights regime as an institution, which I call explanatory variables, provide an overview of the elements of the property rights regime that may explain differences in the outcome of land development processes. The possible characteristics of property rights regime in land development process are presented in Table 9.

Table 9. The characteristics of property rights regime as an institution in land development process

The characteristics of property rights regime as an institution	
Legal and conventional aspects of property rights	
-	the scope of property rights
Legal and conventional aspects of land use and development	
-	the position of each actor involved in the development process regarding the allocation and use of land,
-	the availability of instruments to achieve the goals of land policy <ul style="list-style-type: none"> ○ rules concerning revitalisation processes, public private partnership, treatment of externalities, etc. ○ certainty versus flexibility in the development control
-	distribution of the economic rewards and costs of resource-use decisions

These explanatory variables are characteristics of property rights regime, which seems to have a key influence on the process of land development. The summary in Table 9 presents an attempt to build the comprehensive conceptual model providing a more complete overview of the elements of the property rights regime that may explain differences in the outcome of land development. However, it requires further studies.

The focus in the present study is on these rules in relation to land, which include legal and conventional aspects of land use and development, not legal and conventional aspects of property rights. The conventional aspects of property rights was discussed, e.g., by Needham (2006). I have also elaborated this in Chapter 3.2. In the present study I will pay attention to legal and conventional aspects of land use and development. In particular, three characteristics will be elaborated further as possible explanatory variables:

- the position of the municipality in the development process
- the certainty versus flexibility in development control
- economic right in land development process

All three variables are chosen because they allow a more precise analysis of characteristics of property rights regime as an institution. The precise choice of the explanatory variables for further studies was made based on empirical investigation into the property rights regime in some selected countries (Chapter Four) and initial empirical investigation into the property rights regimes in countries concerned in the research (see the research process on Figure.1). The abductive research process allowed a more dynamic interaction between analysis of empirical data and theory at different stages of the research.

The first explanatory variable was chosen because the planning jurisdiction, meaning the power to determine the urban structure of a place and the management of local building processes belongs very often to the lowest level of self-government. Most European countries have experienced a measure of decentralisation to the most local municipal level. This, however, varies according to the distinction between administrative decentralisation to local arms of central government or to responsible locally elected councils (CEC 1997). By giving the municipality the central role in this explanatory variable, all relations with other governmental bodies are also captured.

The second explanatory variable relates to the two basic different approaches to development control, plan-led versus development-led. The certainty versus flexibility in the development control is one of the main distinguishing characteristic of conceptual plan-led and development-led planning systems (see Table 7).

The third explanatory variable, the economic right in land development process is defined here as a right which is constituted by different partial legal rights that define who the residual claimants are over the development value and who pays the cost associated with the process⁷⁶.

⁷⁶ In property rights theory the difference was emphasised between economic and legal rights (Barzel, 1997, Webster, 2005, Van der Krabben, 2008). Economic right is defined as an ability to derive direct or indirect income or welfare from a resource or attribute of a resource (Webster, 2005). Economic property rights are the end, whereas legal rights are the means to achieve the end (Barzel, 1997). Land development is a transformation process in which the land value is changed and in which the potential for profit is high. Ability to derive direct or

If we will take into account the simplest valuation method of real estate development process, i.e. the residual method of development valuation, we see that development profit (residual value) is defined as the value after development less the development costs and profit. Another related concept, development gain is defined e.g., by Needham & Verhage (1998) as the amount which remains after subtracting from the total value of developed land, the cost of providing the primary services and the value of the total area in its first use. Therefore, it could be said that the allocation of rights to the development value and the responsibility of the cost of development are important elements which finally determinate the economic right in land development.

Diversity of property right regimes in Europe is great. Enemark (2006) emphasized diversity in relation to spatial planning systems, which relates to the property rights regime and explains it in this way: *“There is no such thing as the common planning system for the European countries. Planning systems vary considerably in terms of scope, maturity and completeness, and the distance between expressed objectives and outcomes. The systems also varies in terms of the locus of power (centralisation versus decentralisation), and the relative role of the public and private sector (planning led versus market led approach)”*. However, for the purpose of this research a selection of explanatory variables was made in order to focus the research.

The three explanatory variables define in a very comprehensive way how the systems operate and also specify the different land development structures within the property rights regime (see Table 5.). This makes the analysis more interesting. Therefore, the distribution of rights which defines the position of the municipality in the development process, the certainty versus flexibility in development control, and the economic right in land development process can influence the land development structures. Depending on the allocation and delineation of rights, the land development structure can be more like the regulatory, cooperative or market regime.

The scope of the property rights regime in the countries concerned in this research, which will be under investigation, includes rules in relation to: the spatial planning system with emphasis on the local level regulations, development control, responsibility for plan implementation, availability and characteristics of selected municipal land policy tools, like expropriation (including compensation principles), and pre-emption right. The descriptions of the systems in the two countries are attached to this thesis as appendices.

5.3 Conceptualisation of land development process

In order to investigate the research problem there is a need to make a conceptualisation of land development on at least two levels. The first level refers to how the land development is viewed in this research and what will be the analytical approach. This was explained above. The second level concerns the conceptualisation of land development process. The aim of this

indirect income or welfare from land development could also be defined by the position of the municipality in the development process and by the flexibility versus certainty in the development control exercised by the municipality. Therefore the concept in a sense could refer to all explanatory variables. However, the economic right in land development in this research is not understood in such a wide context.

study is to explain the role of the property rights regime in land development process. This role will be explained by referring to an intermediary of methods (models) of land development described below.

Different authors have devised several models of the development process since the mid-1950's (Ratcliffe *et al.* 2004). It is important to note that no particular model can be fully representative for such a complex process like land development (as convincingly pointed out by Ball 1998), and one model can be only partially representative of the complexity and variability of the land and property development process (Adams 1994). However, in order to gain an understanding of the role of the property rights regime in land development process, the land development process, which is the subject of consideration, should be conceptualised. The chosen perspective limits the scope of the research.

For the purpose of this research, two different ways of conceptualisation of land development process were used as a starting point: Dransfeld & Voß (1993) and Kalbro (1992). The first model emphasises the significance of involvement of particular actors in the land development process in a situation where the local plan is already elaborated by the responsible authority. Following the discussion initiated in Chapter Four, this model is criticized based on current changes in the land and property markets. The second model stresses the aspect of co-operation between the developer and the municipality in the planning process. Further, extension of this model can give possible links to the efficiency problems appearing in the land market.

In my research, I use these models to justify the generalisation of land development processes in international comparative research. The land development processes in the two countries concerned in this research will be investigated in relation to generalisation of the process presented below.

5.3.1 Dransfeld & Voß approach to model land development process

According to Dransfeld & Voß (1993) the essential distinguishing feature between different types of land development processes is who the actual collector of the land is. This refers to who has ownership of the land during the process. Dransfeld & Voß (1993) introduced land development models within urban growth and identified five methods of developing building land:

- Model I – Intermediate purchase by local authority
- Model II – Intermediate purchase by publicly owned legal entities
- Model III – Intermediate purchase by a developer
- Model IV – Single development (without proceedings under public law)
- Model V – Single development (with proceedings under public law).

In practice each country has its own characteristic mixture of different types of land development processes. The types of land development processes differ also between land for housing and land for industry (Figure.9). (Dransfeld & Voß, 1993, see also Needham & Verhage 1998)

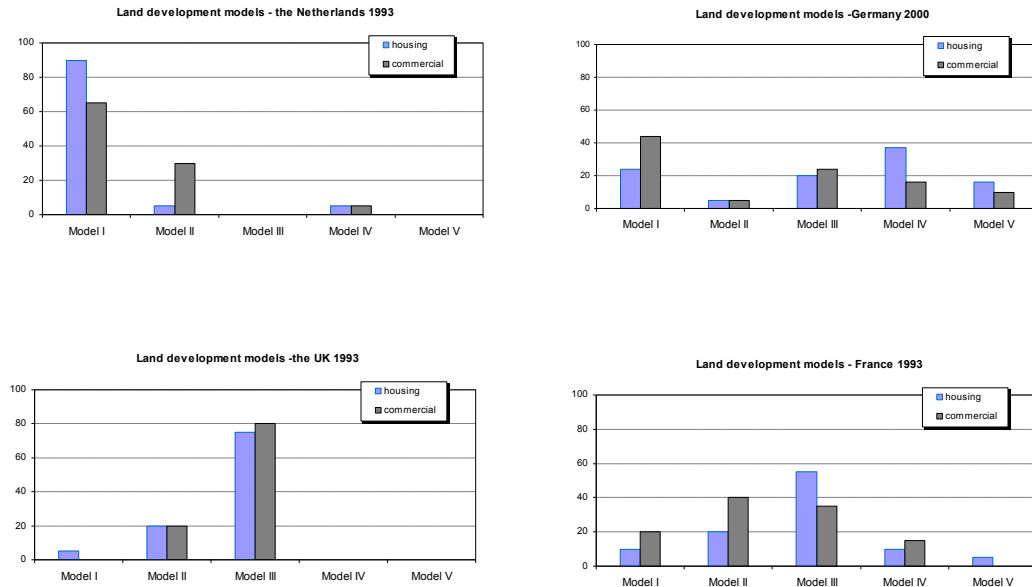


Figure 9. Five methods of land development. (Own picture base on source: Dransfeld & Voß 1993, Dransfeld 2001). These figures are based on evaluation of experts not on quantitative studies.

In the case of Model I, the local authority as a developer buys the whole building area, builds streets and other utilities, and sells new building plots to market parties. Model I represents a traditional post-war concept of land development process in the Netherlands, where a municipality fulfils a crucial intermediary function and carries out most of the land development. It acquires land for each land use plan area separately, carries out the necessary servicing, and then disposes of it to building developers. The common practise is to acquire all land within the boundaries of its plan area (by means of amicable or by compulsory purchase). If the site is already built upon, agreements can be made with owners of the land not acquired, regarding improvements and a contribution to the infrastructure cost. A large part of the land acquired by the municipality is retained in municipal ownership for roads, paths, public open space, etc. The recommended practice is that the total income from disposals must be sufficient to cover costs, including the cost of acquisition, compensation, laying infrastructure and services, as well as the cost of preparing the plan, professional fees and interest charges on capital until these are recouped. The important aspect of land policy in the Netherlands was that the building development was not seriously restricted by shortages of building land, which must be as readily available as gas, water, or electricity. The property developers treat building land as just one of the many factors of production. In the case of the Netherlands it is worth to distinguishing between land and property market, because there are two quite different sets of procedures and actors. 1990 was the turning point in the Netherlands from municipal land development to the increase of public-private co-operation, however the position of the municipalities is still remarkable. Municipalities for instance still dominate the industrial land market (Needham & Louw 2006). This model has also been extended with a site disposal model. Site disposal model means that development companies buy raw land and sell it to the municipality with the right to buy the plots after

they have been serviced by the municipality (Korthals Altes, 2006). (Dransfeld & Voß 1993)⁷⁷

Model II includes the same activities but of companies that are majority-owned by public authorities (and also includes especially instituted development agencies). Model II represents the popular method for the land development process in France. In the 1970s the government in France set up several public land-banking agencies to implement large-scale land-banking schemes. Land-banking was regarded by policy-makers as a way to ensure effective development. The agencies have bought many thousands of hectares of land, notably through pre-emption, and played a key role in the land development process. Agencies are financed by a special tax levied by the local authorities that also have majority representation on the boards of the agencies. (Acosta & Renard 1993, Dransfeld & Voß 1993)

Model III is the “standard” case of privately financed land development by private companies. A developer is responsible for the process, buys all the land, puts in the infrastructure, then sells the ready product and transfers the public spaces to the municipality. Model III is the method of developing building land where private companies are the main actor in the process. In the case of the UK, the main pressure for urban spatial expansion and activity in the land development process came from the private sector. After 1979 the government encouraged market-led development, and the prevailing view was that the market knew best what form of development society required. In the UK private developers often make considerable profit from the purchase of land in advance of planning permission being available. This land banking is widespread and is in part the consequence of a discretionary planning system. Private developers prefer to develop on greenfield sites. The consequence is that over time urban areas have expanded. (Williams & Wood 1994, Dransfeld & Voß 1993)

In another common model, private landowners contract a concession in which they service the plot and cede the infrastructure to the municipality in exchange for the right to develop real estate. (Korthals Altes, 2006)

In the Models I to III, development is performed by one temporary land-owner. In the case of Models IV and V, several different landowners perform the development.

Model IV occurs when land remains the property of various old or intermediate owners and public authorities without using public powers only buy by agreements the land for public utilities to be built up. In the case of Model IV the process of land development is usually undertaken on a case-by-case basis through voluntary conveyances. Municipality produces a development plan, which is then implemented by several different actors. Nobody acquires all the land. Several different landowners (also those who bought from the original owners the land for development or speculation) implement the plan. Municipality is providing the infrastructural services. In the case of Model IV, the public body makes private agreements with the landowners about the land to be acquired for roads, etc. and about the division of the cost. (Dransfeld & Voß 1993)

In Model V, development is achieved with the help of regulated proceedings of land re-organisation. The public authority can use public powers to acquire the land through

⁷⁷ For the description of land policy in the Netherlands see: Needham *et al.* 1993, Leväinen & Korthals 2005

compulsory means. Municipality can also impose charges so as to recover the cost of infrastructure. An example of Model V is an urban land readjustment procedure, which actual origins are considered to be in Germany (German *Umlegung*). In this case, the area in question is reorganised in the way that a group of adjoining land parcels are consolidated for their unified planning and then later subdivided. This method is used in an area with fragmented or otherwise inappropriate property and ownership structure. (Viitanen 2001, Dransfeld & Voß 1993, Dietrich *et al.* 1993)

The study of Dransfeld and Voß was published in 1993. Nowadays the changes occur with respect to the partnership working (public-private co-operation) and contractual governance. Dransfeld's and Voss's approach to use the different methods of developing building land for comparing markets assumed that the development is proceeding according to the approved plan. The models also assumed the situation that one big land collector can be public or private. But the land developer can also be both - public body and private enterprise in co-operation. They can also co-operate at the stage of the local plan elaboration. In present-day this model of land development gains significance.

5.3.2 Kalbro's approach to model land development process

If it is not assumed that development takes place according to a formal plan (Dransfeld & Voß methods) the development process cannot be seen as a single process but several. There would be a different procedure whether the land development process is a straightforward case of plan implementation, or whether the process involves a spatial development plan with a private developer involved. In the latter case the process of planning and plan implementation would be better coordinated (Kalbro 1992, 1999, 2000).

According to Kalbro (1992) the development process can differ depending on land ownership (private or public), and it also depends on the role of the owner in the planning process. Kalbro has presented a categorization of this process using the matrix below (Fig.10).

	The developer does not participate actively in plan preparation	The developer and the municipality prepare the Detailed Plan jointly
The developer owns the land	Case 1	Case 2
The municipality owns the land	Case 3	Case 4

Figure 10. Four typical cases of development procedure. Source: Kalbro, 1992, p.219

In case 1, the developer or developers do not participate in plan preparation. Planning is the entire responsibility of the municipality. Infrastructure is also provided by the municipality (construction of streets, green spaces, water and sewerage mains, etc.). Several different landowners implement the plan. Kalbro (1992) characterised the process in case 1 as normally

very time-consuming. He stressed that the compromises are required between the emphasis of municipal planning and the various interests of the many landowners. In this situation analogy can be found to the Dransfeld's and Voß's Model IV and V, when land remains the property of old different landowners and the municipality is providing the services with or without the use of the public power. Dransfeld's and Voß's Model III appears not to be suitable to the description of Kalbro's case 1. Dransfeld's and Voß's Model III describes the situation when one developer owns the whole area and performs development as an intermediary company. Kalbro characterised developers in case 1 as "unprofessional" property owners. In Sweden big professional developers, who act as a promoter for bigger areas are rather engaged in planning and development agreement with the municipality. This is the subject of the Kalbro's case 2. Thus case 1 of Kalbro's classification might refer to single development. Also the intermediary of publicly owned agencies, who perform activities as the private developer would (Dransfeld's and Voß's Model II) seem not to be included in the Kalbro's case 1, as this is not a popular method in Sweden.

In case 2 the developer owns the land and the developer and the municipality prepare the detailed plan together. Thus the developer becomes involved in the development process at an early stage. According to Kalbro there are two main reasons for the developer to play an active part in planning: to improve the quality of the plan with regard to building development, economics, etc., and to speed up the development process. Therefore, Kalbro has built a link between process and process outcome. In this case the important thing is that the negotiation position of the parties (professional developer negotiating with the municipality about the content of the plan, financing infrastructure, etc.) are well balanced. When land is owned by one big developer, very often the development agreements are signed with the municipality. The final agreement can be preceded by a "prior development agreement". The development agreement defines the responsibility of the municipality and the developer in connection with the development process concerning planning (including planning cost), technical investigation, etc. During the planning process the municipality has the developer to consult and co-operate with. (Kalbro 1992, 2000)

As criteria to the model Kalbro includes a so-called preparatory implementation planning and the participation of the developer in it. The planning process at the local level is divided into preparatory implementation planning and non preparatory implementation planning. Examples of preparatory implementation planning are detailed plans, development drafts and other plans with an intention to develop the land within the near future. The latter type includes the regional plans, the local plans and general guidance for land use.

In case 3, the municipality owns the land and is also responsible for planning. This reminds Model I of Dransfeld and Voß. Thus in that case the development initiative came from the municipality. The municipality is a sole agent during the introductory phase of development. The municipality has no closer knowledge of the future developer's requirements and preferences. In Sweden, in this case plans are less detailed and more flexible and used in land allocation competitions for greenfield areas. Usually after the competition, the plan is altered and adapted to the winning entry. In this instance the municipality can choose to whom to allocate the land, either a non-profit, or a private developer. This provides a tool for the municipality to create competition between developers. Finally the municipality signs the land allocation agreement with the chosen developer. This agreement defines the provision

concerning the land: the price and other responsibilities concerning development. (Kalbro, 1992, 2000)

In case 4, the municipality owns the land but appoints a developer at an early stage in the process, before work on detailed plans begins. Very often the prior agreement is concluded between the developer and the municipality concerning allocation of costs connected with planning and development. This is still a tool to provide competition for developers, however the construction and planning become more integrated. (Kalbro, 2000)

Kalbro's models of the land development processes form a different perspective than Dransfeld's and Voß's, who stressed the actor's participation in the process. In Kalbro's table there are only two main actors considered, but an extension of the model which considers the planning aspects is an interesting way from the point of view of the planning implementation theory.

Ernald Borges (1996) used Kalbro's model as a reference point for the description of the Portuguese land development system. He added a third alternative to the criteria of the preparatory implementation planning. The third alternative was 'the only private participation', which means that *"the developer assumes main responsibility of designing a land use plan for implementation, and that the municipality enters the process at an advanced phase, i.e., when the plan is submitted to the municipality for planning permission"*. In Portugal this third alternative was adequate for the "clandestine" land development, which occurs without any formal approval by the public authority. Ernald Borges elaborated on the following six cases of land development (Tab. 10). Case 6 is put in brackets because according to Ernald Borges it happened very rarely in practice.

Table 10. Six cases for land development. Source: Ernald Borges 1996

	Active participation in preparatory implementation land use planning		
	Municipality	Municipality and private developer	Private developer*
The developer owns the land	Case 1	Case 2	Case 3
The municipality owns the land	Case 4	Case 5	(Case 6)

*Eventually with municipal or central government permission of the private developer's development plan

Therefore, the third column was added. The three columns characterise different forms of coordination in terms of the planning process.

5.3.3 Model for the analysis of land development process

Based on the above discussed models, the perspective for the analysis of land development process can be introduced. It can take the following form (Fig. 11):

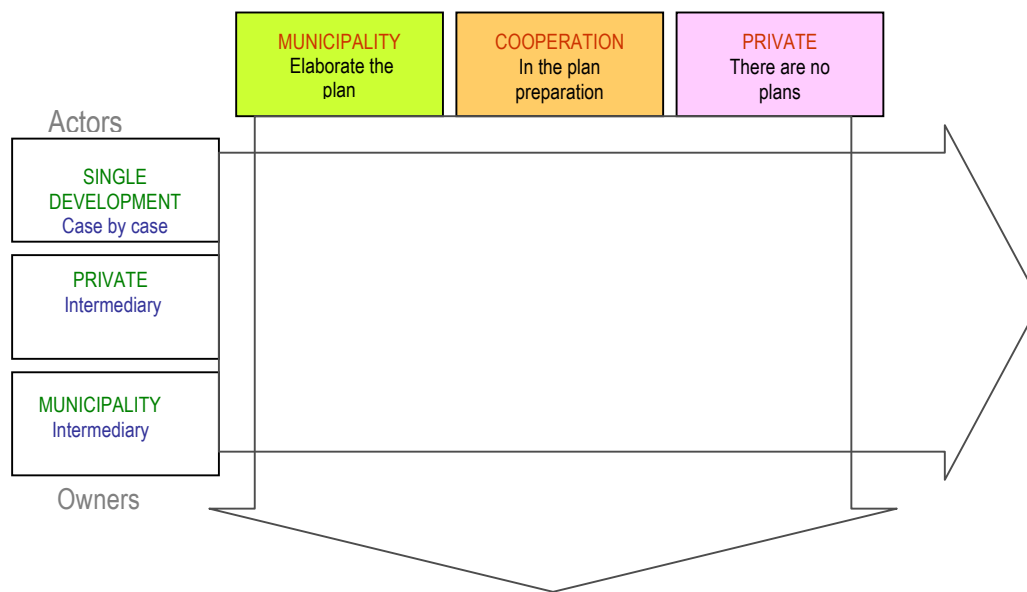


Figure 11. Proposed perspective for the description of land development process⁷⁸

The proposed conceptualisation of land development emphasised the ownership responsibility during the process, and responds to the current trend of market oriented planning taking into consideration the participation of developers in the planning process. The planning process refers after Kalbro to the preparatory implementation planning.

Nowadays the partnership arrangements between local authorities and the business communities are very complex. There are more parties involved in the process than two discussed, private and public. The public can take a variety of forms and the same private developers. Although there are many parties involved in the land development process the focus in the proposed research framework is on the municipality (the local authority) and the

⁷⁸ In reference to the growing institutional literature relating to urban complexity the distinguished methods of developing building land can also be related to concepts of the governance of places in urban areas (Healey, 2007). The first column can be related to the strong hierarchical governance system, which relates to the planning thought and practice dominant till the 80's. This approach was very often criticized for the simplified physical view of the cities, in which place qualities and connectivity were understood through the physical form of buildings and urban structure (Healey 2007, p.3). Second column refers to the trend of collaborative and communicative planning theory, which is nowadays widely recognised and accepted especially by Nordic planners (Segren, 2009). This trend follows the line of argument that development of urban areas cannot be understood and planned by government actions. Co-operation between different actors, different dimensions of urban complexity can be integrated in a better way. This is a common trend in Western European countries since the 80's. Finally, the last column refers to phenomena, which is observed in post-socialist country undergoing the process of economic transition, where the development escaped from traditionally understood forms of planning (also as negative reaction to all kinds of planning, after years of planned economy) and it is not yet a form of co-operation. This line of development could refer to a market governance system. However, the way the market is structured could be highly criticised. It is interesting also to see what could be the possible result when we stop planning and let the invisible hand of market economy work in a specific structure of the market.

developers. Developers are categorised further into two categories. First there are small landowners who perform some development activity, usually building their own house. Second, there are professional developers who take on the intermediary function and acquire a big area of land for the implementation of the project.

Planning is categorised in three lines: conducted by the *public sector*, the *public and private sectors together* and “*development without plan*”. The first two lines can be recognised in the Finnish, German and British planning systems, as well as in a wider international context⁷⁹. The third line “development without plan” was set up after the initial research into the planning practice in Poland. The planning lines need not be purely independent. Rather, we should think of them as forming the scale of planning practices offered by the planning systems. Thus, the distinguished land development processes follow three lines of development procedures. In some cases the land development process contains the land use planning of the area in question. Therefore, land development and planning (preparatory implementation planning) are integrated into one process. The developer and the local authority co-operate at the stage of drafting the local land-use plan/plans. In other cases the land use planning process is external to land development process and the developer does not actively participate in the plan elaboration, but only checks if his/her idea falls into the provision of the plan. There are also other situations, when the municipalities, traditionally responsible for planning at the local level (in Western European countries), are not active in land use planning and the developer is submitting the development proposal.

What I will argue further is that the actual distribution of rights and duties within the property rights regime facilitates certain land development processes (methods) to occur. When thinking about institutional design in countries like Poland, this distribution and delineation of property rights as an initial situation should be first improved in order to respond to the contemporary urban complexity.

The following empirical part of the thesis investigates how the theoretical ideas can be operationalised and tested in practice. How the property rights regimes define the balance in rights in relation to the land development processes in the two countries, Finland and Poland.

5.4 The limitations for further research

Institutions are not static in principle. They change over time due to new economic, political or other circumstances (Jütting 2003). Therefore, the collection of data concerning different institutional set-ups in this study was closed in the year 2008.

There are a lot of other formal rules that could make a deep impact on land development and which constitute the part of the property rights regime. Particularly pertinent to land development could be European regulation concerning rules on state aid or public procurement (Korthals Altes, 2006). These regulations, as well as other European legislation,

⁷⁹ The third column may also refer to the so-called in British literature, the non-plan regime (Ratcliffe & Stubbs 1996 p.165). Non-plan regime was created in the UK by the Thatcher government in order to encourage private development. The meaning of that column however is wider, including also the situations which are not intended and create the barriers for an investment and development.

are considered as important, however they are not included into the scope of this study. There are several limitations that must be made in order to make the study manageable for a single researcher. In this research the rules under public law that regulate land development for private housing in greenfield urban areas are the subject of consideration. The special development areas have been excluded because the rules governing these areas are different (Kurunmäki, 2005). The same applies to the regulations relating to construction process or development in the urban fringe areas and rural areas. All this limitation reduces the number of variables when trying to investigate the research question.

In this study I also focus on the rules of land-use planning applied at the local level. The power of higher-level authorities is not a topic of this research and it is mentioned only as a reference point for the actions of local authorities.

PART TWO

A COMPARATIVE ANALYSIS ON THE INFLUENCE OF THE PROPERTY RIGHTS REGIME ON LAND DEVELOPMENT

Part Two of this thesis applies the framework for analysis to a study of land development. The aim of this study is to increase knowledge on the role of the property rights regime in land development process and to contribute to the further conceptualisation of the impact of the institutions on land development processes. In order to achieve the aim of this study, an analytical model to study land development based on the property rights approach was proposed, and a comparative analysis on the influence of the property rights regime on land development was conducted. The analytical approach adopted in this study assumes that we should pay attention to the distribution of rights and duties given by the property rights regime (an approach of ‘rights in property rights regime’), and further build the link between distribution of rights within the property rights regime and processes of land development. There are a lot of different rights and obligations given by the property rights regime in land development. The property rights regime is a complex system of public law and private law in relation to land and development processes. Therefore, the analytical approach adopted in this study proposes to distinguish and concentrate on elements of the property rights regime, which are important characteristics of the differences between different regimes. Three elements were identified based on international empirical studies and initial empirical research in the systems of the two countries, Poland and Finland.

In the next step, the delineation and allocation of partial rights within the property rights regime in relation to the selected elements (explanatory variables) were further explored. In the first chapter of Part Two (Chapter Six) the delineation and allocation of partial rights in relation to all three explanatory variables chosen for further analysis will be summarised and conceptualised. This chapter also includes the summary of land development methods in both countries. Furthermore, the comparative analysis of the property rights regimes in the two countries, Finland and Poland, are presented in the three following chapters. The delineation and allocation of partial rights in relation to the selected explanatory variables will be discussed and connected to the methods of land development (land development processes). Chapter Seven is dedicated to the position of the municipality in the development process. Chapter Eight discusses the certainty versus flexibility in development control. In Chapter Nine the delineation and allocation of rights is presented in relation to the economic right in land development. Each chapter which discusses one explanatory variable will be summarised separately at the end.

In Chapter Ten the possible link between the property rights regimes and the land development processes is discussed. This chapter concludes the research.

A systematic description of the system in each country can be found in the appendices, respectively for Finland – Appendix A, and for Poland – Appendix B. Each appendix includes more detailed information in relation to the three explanatory variables, which were the focus of the research, as well as more information concerning the administrative structure of the country, the source of law and the spatial planning systems. In the discussion in the second part of the thesis the only issues selected were those which are important for discussing the delineation and allocation of rights and duties and its relation to the methods of land development. The more comprehensive description concerning each discussed issue can be

found in the appendices. Only the basic planning instruments are introduced at the beginning of Chapter Six.

Chapter Six

THE ELEMENTS OF THE PROPERTY RIGHTS REGIME

In the first chapter of part two in this thesis the delineation and allocation of partial rights in relation to all three explanatory variables chosen for further analysis will be summarized and conceptualised. This chapter includes also the summary of land development methods in both countries.

This chapter is structured as follows. The first part will analyse the variations in the property rights regimes. Section 6.1 will then identify the elements and operational components of explanatory variables within the property rights regimes. The second part, Section 6.2 will discuss the methods of land development in both countries.

6.1 The elements of the property rights regime in land development processes

Three central elements will be elaborated further in this study as explanatory variables for the differences in the property rights regimes:

- the position of the municipality in the development process
- the certainty versus flexibility in the development control
- the economic right in land development

The choice of the explanatory variables was made based on the results of an empirical investigation into the property rights regime in a European context and from initial empirical investigation in countries concerned in this research. All three explanatory variables were elaborated further. The distribution of rights in relation to the identified explanatory variables was the subject of consideration in the empirical research. The means of three explanatory variables were examined in the context of two countries: Poland and Finland. The investigation contained public law in relation to land use planning and plan implementation instruments. The descriptions of the systems used in both countries, which discusses the elements of the property rights regimes, are added as appendices at the end of this thesis. Within each explanatory variable, the operational components can be distinguished which are important while defining the nature of the explanatory variables. First, the explanatory variables with the operational components will be presented. Then, the operational components and partial rights in relation to the explanatory variables will be summarized. This conceptualisation indicates the scope of possible changes in the property rights regime in Poland which could be taken into consideration and elaborated further. In the following chapters an attempt will be made to establish the link between operational components and partial rights and the methods of land development.

6.1.1 The position of the municipality in the development process

Based on international comparative research of spatial planning systems in European countries, it can be stated that the planning jurisdiction, meaning the power to determine the urban structure of a place and management of the local building processes very often belongs

to the lowest level of self-government. Most European countries have experienced a measure of decentralisation to the most local municipal level. This, however, varies according to the distinction between administrative decentralisation to local arms of central government or to responsible locally elected councils. It also varies according to the extent to which the central government retains a determining influence through supervisory and/or reserve power (CEC 1997). Accordingly, the first explanatory variable - the position of the municipality in the development process was investigated in two countries in more detail in relation to the land development processes. The decision-making power is clearly placed at the local level in Finland. In Poland the situation is not so clear. The operational components of the position of the municipality in the development process which will be elaborated in a comparative research include the possible interference of state authority (or other self-government authority) into planning at the local level, balance of rights between private landowners (developers) and the municipality in the process of land development, and the municipal rights to decide about allocation of land.

6.1.2 The balance between certainty and flexibility in development control

At the European level there are different means of planning control such as a centralized versus a decentralized approach and plan-led versus a development-led approach. The second explanatory variable refers to the scope of possible influences of the municipality on the land development processes in order to achieve the goals of land policy as well as to control the socially unwanted aspects⁸⁰ of the land development processes. The hierarchy of planning documents, the property rights versus the right to develop, the availability of instruments to control development (including externalities and public goods) should be taken into account here as the operational components of this explanatory variable. Poland represents a more market-led (discretionary) system. Finland is more on a plan-led type of approach to development control.

⁸⁰ In neo-classical economics, if the competitive equilibrium cannot be achieved, there will be a suboptimal allocation of resources – market failure. However, as already was discussed, both the market and the government policies and actions have their failures. In relation to land and property market, both the land markets as well as land and planning policies fail to allocate resources completely efficiently. According to Buitelaar (2003) the discussion between the failure of the market and the failure of the government does not bring us any further, as Buitelaar (2007, p.5) puts it: “*The reality is often too complex to fit within the neat dichotomy of ‘the government’ (planning) versus ‘the market’.*” Van der Krabben (1995, p.29-30) proposed instead of calling ‘failure’ the problematic situations which occur in property development to call them socially unwanted aspects of real estate development processes, as he puts it: “*The concept of market failure is misleading because of the meaning that is ascribed to this perception in neo-classical economics. For using this concept supposes in the first place that a perfect market should always be preferred above situations in which the market is by definition not perfect, in the second place that it should always be possible to make a distinction between optimal and non-optimal situations, and in the third place that problematic situations are only recognized as such, when they fit in this restricted definition of ‘failure’.* Instead, I assume that socially unwanted situations may occur in all kinds of markets, be they perfect or not. It is much more interesting to analyze and explain these situations, taking them as the starting point of analysis. Vice versa, imperfect market conditions may result in more acceptable outcomes of market processes that would be the case under perfect market conditions. Therefore, an analysis of real estate market functioning in terms of imperfections and failures is in the context of preset study not useful.”

6.1.3 Economic right in land development

The economic right in land development process was defined as a right which is constituted by different partial legal rights that define who the residual claimants are over the development value and who pays for the cost associated with the process.

Allocation of rights to development value relates to the approach to capture the unearned increment. Costs of land development can be split into a few categories. First, there is the cost of providing services essential for building sites to be developed, like the provision of technical infrastructure, open spaces and green areas (primary infrastructure). In some countries, the cost of land for social housing is taken into consideration. Second, the cost that refers to connecting the development site to the infrastructure network of public services like day-care, schools, hospitals or museums (secondary infrastructure). Third, the cost of planning work as well as the costs of compensations for the loss of value that occurs due to new adopted plans. The important cost of land development is also constituted by the costs of the provision of non-profitable uses (parks, social housing, etc.). All these partial rights constitute the economic right in land development and were investigated in the empirical research.

After the comparative research, the following operational components of the economic right in land development were distinguished:

- the contribution to development costs
 - planning costs
 - the costs of the provision of infrastructure,
 - transfer to the municipality street and public road areas
 - the compensation to landowners for land use restrictions
- the right to development gain.

The issue of social housing is not addressed separately as a cost connected with land development in the countries concerned in the research. Under the term of ‘the cost of infrastructure’ the provision of all non profitable uses are discussed in the comparative research.

6.1.4 Explanatory variables with operational components

In relation to each operational component, some partial rights can be discussed. The explanatory variables within the property rights regimes, the operational components as well as examples of partial rights distinguished during the comparative research are summarised in the table below.

Tab.11 The main elements of the property rights regime in land development process

<i>Explanatory variables used in this study</i>	<i>Operational components</i>	<i>Examples of partial rights</i>
The position of the municipality in the development process	<ul style="list-style-type: none"> - the position of the municipality versus government representations - the balance of rights between private landowners and the municipality - municipal right to allocate land - public participation in planning procedure 	<ul style="list-style-type: none"> - the right to make an independent decision concerning land development issues (planning monopoly - the right to decide how land will be developed and the right to decide by whom land will be developed) - the right to develop versus ownership rights - the planning rights
The balance between certainty and flexibility in development control	<ul style="list-style-type: none"> - the hierarchy of planning - the right to develop - availability of instruments to control development 	<ul style="list-style-type: none"> - the right to make an independent decision concerning land development issues (planning monopoly - the right to decide how land will be developed and the right to decide by whom land will be developed) - the right to develop versus ownership rights - the power to protect the third party's interest
Economic right in land development process	<ul style="list-style-type: none"> - the contribution to development costs (planning costs, the costs of the provision of infrastructure, transfer to the municipality street and public road areas, the compensation to landowners for land use restrictions) - the right to development gain 	<ul style="list-style-type: none"> - the right to the development gain - the obligation to cover the development costs - the right to the residual value of land after changing the planning in the expropriation process - the right to unearned increment

The columns from left to right progress in detail explaining the criteria for each variable, this highlights the differences in the variations in the property rights regime. In the table above I mainly refer to the distribution of rights. However, every right could be transferred into duties. For example the right to make an independent decision concerning land development

issues could be transformed into the duty to, consult with governmental representatives on the decision.

There is also an overlap between the partial rights which constitute the identified explanatory variables. One partial right can contribute to the characteristics of more than one explanatory variable.

6.2 Comparison of methods of land development

There are big differences between municipalities in Finland and in Poland concerning land policy, planning and the use of instruments, which promote the implementation of land-use plans. The generalisation made at the country level must be made with caution. As a starting point it could be stated that a comparison contrasts two countries with a different attitude towards municipalities pursuing active land policy.

In Finland, some of the municipalities persuade an active land policy. Many others are quite passive concerning plan implementation and land acquisition. In municipalities with mainly privately owned land, the municipal council often follows a more development-led line according to the interest of the landowners (Larsson 2006). On the other hand for example Helsinki, the capital, traditionally persuades a strong land policy owning over 50% of its administrative area⁸¹(Virtanen 2003). Another typical phenomenon of land development in many bigger Finnish cities are land use and development agreements, which are the result of active cooperation with developers or land owners in land-use planning and development. Therefore on the one hand we have a situation of so-called active land policy, where the public sector takes the lead in land development process. On the other hand there are situations where passive land policy prevails and private actors take initiative in the implementation of land-use plan. In between there are possibilities of cooperation in the preparation of a land-use plan. According to Viitanen *et al.* (2003, p.59) the share of the development on the municipal assigned land is approximately 50% to 60% of all developments. By estimation 10% to 20% of plans involve land use agreements and the popularity of agreements in the municipalities is increasing. The table below presents the methods of developing building land in Finland in reference to the method presented in this study as a point of reference. (see also Appendix A, p. 215-221, and Fig.15 about the involvement of different actors in land development)

⁸¹ In January 2009 parts of neighbouring municipalities were incorporated into the Helsinki administrative area. Therefore this figure could be different.

Table12. Significant methods of developing building land in urban areas in Finland

	MUNICIPALITY elaborate the plan	COOPERATION in local plan preparation	PRIVATE proposal
SINGLE DEVELOPMENT	X	X	Shore areas
PRIVATE Intermediary By developer	X	X	
MUNICIPALITY Intermediary Public body	X	X	

There are no statistics to show land development methods in Poland. However, the marginal role of the municipalities in land development was emphasized for example by Kirejczyk & Łaszek 1997, Jędraszko 2005, p.77. Polish municipalities in general do not pursue an active land policy in the sense of acquiring the land, planning and putting in an infrastructure and then disposing ready plots to building developers. Land development follows the model of the so-called single land development (see Dransfeld and Voß, 1993), i.e. the process of land development is usually undertaken on a case-by-case basis. Land remains the property of various old or intermediate owners (developers), and public authorities are responsible for public utilities to be built up. The results of the investigation of the Supreme Chamber of Control conducted in the years 2006 and 2007 with respect to the 2003-2006⁸² period, which meant to assess the activities of local authorities with respect to the preparation of land for development and with respect to the promptness of issuing decisions concerning public interest projects and land development conditions, stated that municipalities were neither exercising their rights or responsibilities with respect to land development, and the increase in the area covered by local spatial development plans was insufficient relative to the needs. (Havel & Załączna, 2009)⁸³

Therefore, the dominant attitude towards land development in municipalities remains mainly passive (see also the Report of the Polish Ministry of Infrastructure of 2007). In Poland, planning is the so-called ‘own task’ of the municipality. There are no regulations concerning co-operation in financing the spatial plan and land use agreements in spatial planning law. The cooperation between private and public sector (PPP) in land development in Poland is an emerging trend (Załączna & Tasan-Kok, 2009). The table below summarizes the methods of developing building land in Poland in reference to the methods discussed in this study.

⁸² The control took place in 64 municipalities (NIK 2007)

⁸³ (see Appendix B p. 274-279)

Table 13. Significant methods of developing building land in urban areas in Poland

	MUNICIPALITY elaborate the plan	COOPERATION in local plan preparation	PRIVATE no plan
SINGLE DEVELOPMENT	X		X
PRIVATE Intermediary By developer	X		X
MUNICIPALITY Intermediary Public body			

The understanding of the third column in the Polish context should be explained. Initially it was assumed that the third alternative was the situation when a developer takes responsibility of designing a land use plan, and that the municipality enters the process at an advanced phase, i.e., when the plan is submitted to the municipality for planning or building permission. In Poland, developers are not submitting plans but applications for decisions on conditions of site development. The application for a decision defining conditions of site development should include for example information on: the boundaries of the plot, which must be indicated on a copy of the basic map or, if such documents are unavailable, a copy of the cadastral map, indicating the plot and the area where the investment is to take place (scale of 1:500 or 1:1000, but 1:2000 for line investments). Investment characteristics defining requirements on water, energy and waste disposal, as well as other needs concerning technical infrastructure and, where necessary, methods of rendering waste harmless, characteristics defining planned ways of developing the land, type of structure and development, including purpose and dimension of structures (information to be submitted in written and graphic form), type, scale and location of project should also be given. Therefore the application is more similar to the initial architectural design of a proposed project. Spatial plans can in a creative way identify the directions for future development of land. Decision on conditions of site development can only be based on existing law and analysis of the neighbourhood regulated by law. Therefore the third column, in the case of Poland, means no plans and no planning. (see Appendix B p. 281-284)

Chapter Seven

THE POSITION OF THE MUNICIPALITY IN THE DEVELOPMENT PROCESS

This chapter discusses the position of the municipality in the development process in the two countries concerned in this research; Poland and Finland. The position of the municipality in the development process was chosen as an important characteristic to show the differences between property rights regimes (explanatory variable).

Four main issues were distinguished and will be discussed as being the most significant, they are: the position of the municipality versus government representations, the balance of rights between private landowners and the municipality, municipal right to allocate land and public participation in the planning procedure. An attempt will be made to indicate the relation of delineation and allocation of rights given by the property rights regime and the methods of land development which were summarized in the previous chapter.

The chapter starts with a short introduction of the main instruments used in land use planning and development in both countries. The aim of this introduction is to make the reader familiar with at least the names of the planning instruments used in both countries. A more comprehensive description of the property rights regimes and land development processes in both countries can be found in the appendices, respectively for Finland – Appendix A, and for Poland – Appendix B.

7.1. Introduction to comparative analysis

In both countries there are three main spatial planning levels. In Poland the main planning levels are: the municipality level (the framework study, the local plans and the decision on conditions of site development), the regional level (the regional plans and the regional development strategies) and the national level (the concept of national spatial development and governmental programs of national importance). Each level of planning and all instruments are described in Appendix B, p.279-287. Figure 22 (Appendix B, p.282) presents the scheme of the planning system.

In Finland, the main planning levels are: at the municipality level (the master plan and the local detailed plan), at the regional level (the regional plan) and at the national level (the national land use objectives). Each level of planning and all instruments are described in Appendix A, p.221-229. Figure 16 (Appendix A, p.223) presents the scheme of the planning system.

7.2 The position of the municipality versus government representations

In both countries, local authority shall take charge of land use planning and control within its territory. In Finland the municipality is responsible for monitoring the state and development of land use, building and the built environment and the cultural and natural environment as required for planning and building (LUBD §2). In Poland, tasks of the municipality, are tasks aimed at satisfying the collective needs of the community, such as, e.g. 1) the spatial order, property management, environmental protection and conservation and water management, 2)

the municipal roads, streets, bridges, squares and the organization of traffic, 3) the water supply, sanitation, disposal and treatment of urban waste water, the maintenance of cleanliness, waste disposal, the supply of electricity, heat and gas, 4) the local public transport, 5) the protection of health, 6) the social welfare, including the care facilities, 7) the municipal housing (the Act of Self-governing Authority on the Local Level of 8th March 1990, article 7.1). In order to do this, the local authority in both countries according to law must have sufficient resources and expertise available for these functions.

However, in Finland the municipalities have the right to levy municipal income tax and tax on real estate calculated by multiplying the value of the real estate with the tax rate. Almost half of all municipal revenues consist of municipal income tax paid by residents, real estate tax and a share of corporate tax. In Poland municipalities receive a share of the personal income tax and the corporate income tax from the State budget. In Poland the real estate tax also belongs to the municipality but it is calculated based on the area of the real estate (the area based real estate taxation system). It is not as important as revenue in the municipal budget. In general inadequate equipment of the Polish municipalities in the source of funding necessary to carry out their statutory activities seems to be a serious problem. Therefore the incentive system to attract citizens to build their houses in the municipality by offering land or taking care of a high quality living environment, starts to differ when looking at the distribution of rights given by the financial system. (Taxation in Finland 2005, Municipal Finances, Concise Statistical Yearbook of Poland 2007)⁸⁴

As a rule, Finnish municipalities have a so-called planning monopoly, which is understood in the way that they have the right to decide about content and areas covered by land-use plans elaborated at a local level. Finnish municipalities initiate and carry out the process of plan elaboration quite independently in comparison to Polish municipalities. Only consultations (negotiation) with regard to issues concerning the planning of land use and land development have to be conducted with the regional environmental centre, i.e. the state authority (LUBA §§ 8, 18, 66). Development negotiations are conducted at least once a year, between the local authority and the regional environmental centre on issues concerning the planning of land use and land development within the local authority's territory, important planning matters that are or will be in the near future pending (LUBA § 8).

As it is stated by law, the local authority in Finland shall see to the necessary drawing-up of a local master plan (see Appendix A) and to keeping it up-to-date (LUBA § 36). The local master plan and the local detailed plan (see Appendix A, p. 225-229) are approved by the local council (LUBA §§ 37, 52). However, there are possibilities for the Finnish government to interfere in the planning monopoly of Finnish municipalities. These include a written rectification reminder and an order on drawing up or amending a local detailed plan or the local master plan and conditional fines. The regional environmental centre has a right to issue a written rectification reminder to a local authority after the authority has approved a local master plan or a local detailed plan if the plan has been drawn up without taking national land use objectives into account or the plan is otherwise in contravention of the law, and it is in the interest of the public good that the question is placed before the local authority for a new decision (LUBA § 195). In addition if the municipality does not fulfil its planning duties, i.e. does not draw up a building ordinance, the necessary local master plans or local detailed

⁸⁴ See also Appendix A, and Appendix B

plans, or even keep them up-to-date, then it is evident that the municipality impedes the attainment of goals set in legislation for land use planning and for the steering of building. In this case the Ministry of Environment, after negotiations with the municipality, may issue an order on drawing up or amending a local detailed plan or the local master plan within a specified period (order for the enforcement of planning duties or order for the purpose of attaining a national land use objective). The ministry may also impose a conditional fine requiring the local authority to observe the order⁸⁵.

These are main legal instruments of the state authority in Finland which interfere with the municipal planning monopoly. The State has no power to draft or to adopt the land-use plan instead of municipalities. The state also has no power to change the content of the plan. In the case of a written rectification reminder, the regional environmental centre can make an appeal to the administrative court. The content of the plan, however, is still in the hands of the municipality. The court cannot change the content of the plan. The court can only accept or cancel the plan or part of it. Any appeal should be based on an administrative error or inconsistency with law. It means a decision taken by the municipality can be appealed on the grounds that: it was not taken in the proper order; the authority taking the decision exceeded its authority; or the decision is otherwise illegal (The Finnish Local Government Act, section 90).

In Poland, the approval mechanism plays an important role in the land use and development system. The mayor responsible for preparing the draft of the framework study or the local plan must seek approval for the draft with many different authorities. Below, the planning procedure in Poland is explained in detail in order to show this complex system of approvals.

In Poland, for example, after a resolution is undertaken by the municipal council to proceed with drawing up a framework study, the mayor should undertake the following steps in the planning process (art. 11 LUPDA):

- 1) To announce in the local press and by notice, as it is customary in the locality, the adoption of a resolution to proceed with drawing up a framework study, specifying the form, place and date for the submission of proposals for a framework study. The period to submit the proposals should not be less than 21 days from the date of the announcement;
- 2) To notify the institutions and the authorities in writing, which are competent for agreeing with and issuing opinions on a draft of the framework study about adoption of the resolution to proceed with drawing up the framework study;
 - To consider the proposals;
 - To prepare a draft of the framework study;
 - To obtain from municipal or from other responsible urban planning and architectural commissions their opinion on the draft of the framework study;
 - To agree on the draft of the framework study with the Board of the Region in the scope of its compliance with the Regional Plan;
 - To agree on the draft of the framework study with the Marshal of the Region in terms of its compliance with the programs of investments of national importance ;

⁸⁵ According to Viitanen (2009) the instrument has not been used. More about possible interferences by the government in the planning monopoly of Finnish municipalities can be find in Appendix A

- To call for feedback (opinions) on the solutions adopted in the draft of the framework study to:
 - a) county administrator
 - b) neighbouring municipalities
 - c) competent regional conservator of monuments
 - d) the competent authorities of the military, border protection and security of the state
 - e) the director of the competent authority in the field of maritime management concerning development of technical belts, protection belts as well as sea ports and marinas
 - f) competent supervisory authority of mining with regard to the management of the mining areas
 - g) the competent geological authority
 - h) minister responsible for health in terms of land use of conservation spa
- To make changes resulting from the opinions obtained and made arrangements (agreements);
- To announce that the draft of the framework study will be available for public inspection at least 14 days before the public display. To display the project of the framework study for public inspection for a period of at least 30 days and organize at that time, public discussion on the solutions adopted in the draft of the framework study;
- To designate in the notice referred to in paragraph 10 the period, which is not shorter than 21 days from the date of completion of the public display, within which the legal and physical person and organizational units without legal personality can give comments on the draft of the framework study;
- To submit to the municipal council for adoption a draft of the framework study along with a list of excluded comments

After a resolution is undertaken by the municipal council to proceed with drawing up the local plan the mayor should undertake the following steps in the planning process (art. 17 LUPDA):

- 1) To announce in the local press and by notice, as it is customary in the locality, the adoption of a resolution to proceed with drawing up the local plan, specifying the form, place and date for the submission of proposals for the local plan. The period to submit the proposals should not be less than 21 days from the date of the announcement;
- 2) To notify institutions and the authorities in writing, which are competent for agreeing with and issuing opinions on a draft of a local plan about adoption of a resolution to proceed with drawing up the local plan;
- 3) To consider the proposals;
- 4) To prepare a draft of the local plan together with an estimate of the environmental impact, taking into account the provision of the framework study;
- 5) To draw up an estimate of the financial implications of the adoption of the local plan
- 6) To obtain feedback (opinions) on the draft plan from :
 - a. Municipal (or other responsible) Commission of Architecture and Spatial Planning
 - b. Municipal administrator or mayor of areas adjacent to the area covered by the plan, concerning the location of the public investment of the local importance;
- 7) To agree on a draft plan with :
 - a. the Marshal of the Region, the Board of the Region, and the Board of the County in respect to the governmental tasks and other tasks

- b. competent regional conservator of monuments
- c. the competent authorities to agree on a draft plan on the basis of separate regulations
- d. competent manager of road, if the land use of areas adjacent to a road might affect the traffic
- e. the competent authorities of the military, border protection and security of the state
- f. director of the competent authority in the field of maritime management, sea ports and marinas
- g. competent authority of the mining industry in case of land designated for mining
- h. the competent geological authority
- i. minister responsible for development of spa areas
- 8) To obtain permission to change the land use from agricultural and forest to non-agricultural and non-forest purposes
- 9) To make changes resulting from the feedback obtained and made arrangements
- 10) To announce at least 7 days before, in the manner set out in paragraph 1 about public display of the draft plan. To display for a period of at least 21 days the plan to the public together with an estimate of its environmental impact and organize at this time a discussion concerning solutions adopted in the draft plan
- 11) To designate the period (not shorter than 14 days from the date of the end of the pledge of the plan) within which individuals, legal entities and organizational units without legal personality can present comments concerning the draft plan
- 12) To consider the comments, no later than 21 days from the date of expiry of the deadline for its submission
- 13) To make changes to the draft plan due to accepted comments
- 14) To submit to the municipal council the draft plan, together with the list of comments which were not taken into consideration

In Poland, after the framework study or the local plan is adopted by the municipal council the mayor has to submit the resolution concerning adoption of the framework study or the local plan to the Marshal of the Region (Voivodeship) in order to assess their compliance with the law. The mayor submits also as attachments a list of not included comments and all planning documents. (art. 12.2, 20.2 LUPDA)

According to law in Finland, a municipality or a regional council whose territory is affected by the material impact of a local master plan or a local detailed plan must be involved to a sufficient degree in investigating the impact of the plan⁸⁶. Negotiations between the authorities are set up when planning begins and after a plan proposal has been available to the public and comments and opinions concerning it have been received. The local authority shall agree with the regional environmental centre on setting up the negotiations, and provide the material needed for them. Therefore the authorities whose sphere of activity the matter may concern are invited to the negotiations, but the authority does not approve the plan proposal⁸⁷.

⁸⁶ For instance the Ministry of the Environment is invited to negotiations that concern key issues related to large urban areas

⁸⁷ An opinion on a local master plan proposal is requested from: 1) the regional council; 2) the local authority whose areas the plan affects; and 3) the regional environmental centre and authorities and organizations important in terms of the regional plan, as necessary. An opinion on a local detailed plan proposal shall be requested from: 1) the regional council if the plan concerns issues addressed in the regional plan or which are otherwise regionally significant; 2) the regional environmental centre if the plan concerns national land use objectives, an area or feature significant in terms of nature or building conservation, or an area reserved in the

Members of the municipalities and other interested parties are entitled to enter objections to the plan proposal. (LUBD, §§ 1, 18, 19, 20, 26)

The content of an approval mechanism in Poland is not well defined and the system is still complicated. The law does not specify any principles, values, resources, conditions or requirements that are to be attained or protected. Therefore the delineation of rights and responsibilities are not precisely defined. It is stated in the law rather vaguely that the approvals mechanism should reflect the competencies of the authorities concerned and should appropriately follow the procedure laid down in the Administrative Procedure Code (Izdebski *et al.* 2007, p.12).

In Poland, according to the provision of the law in certain situations the Marshal of the Region (Voivodeship) can draw up and adopt the local plan. It is possible in situations when: the municipal council has not adopted the framework study, or if the municipal council has not begun the procedure of the framework study elaboration, or if the municipal council while adopting the study did not specify the areas of public investment projects of the national and regional importance included in the regional plan or in the programs of investment of national importance. In these cases the Marshal of the Region (Voivodeship), after taking steps to agree to a deadline for incorporating the investments and the conditions for incorporation of the investment to the framework study, ask the municipal council to adopt the framework study or to amend it within the prescribed time limit. After the expiry of that period, Voivodeship draws up a local plan for an area where municipal council had not fulfilled its duties, to the extent necessary for the implementation of the public investment projects. The local plan adopted in this way has the same legal effect as the local plan adopted by the municipality. (art. 12.3 LUPDA)

The scope of interference of government authorities into the municipal planning is quite different in Finland compared to Poland. In Poland the approval mechanisms have in fact become a tool to serve to implement governmental and provincial policies in municipalities. In Finland there is a clear planning monopoly situation. In both countries municipalities are responsible for providing welfare services to their residents and have the same power, similar rights and obligations even though there are big differences in resources, size and population. However, the position of the municipality versus other government representations and other levels of self-government differ in many dimensions. Finnish municipalities seem to be much stronger. The financial capacity, the possible interference of other units into the scope of municipal activities gives the Finnish municipalities a different position in comparison to Polish municipalities to implement active land policy and methods following first line of planning distinguished in this study.

regional plan for recreation or conservation; 3) local authorities whose areas the plan affects; and 4) other authorities whose sphere of activities the plan concerns and organizations important in terms of the plan, as necessary. (LUBD, §§ 20, 28)

7.3 The balance of rights between private landowners and the municipality

In Finland, as a rule the municipality sets up the development possibility. The municipality has a planning monopoly and can decide which areas will be planned. Therefore the municipality can refuse to plan an area and in this case private landowners have no real instruments to develop their land in urban areas. In addition, in the detailed plan area the municipality even has a right to issue an owner a reminder to build.

Reminder to build may be issued after the local detailed plan has been in force for at least two years (LUBA §97). Reminder to build can be issued only if less than half of the gross floor area of permitted building rights for the plot has been used or the plot has not been developed in keeping with the plan. If the landowner has not developed the plot in the next three years, the municipality is entitled to expropriate the plot without special permission but with a full compensation to the landowner (LUBA §97).

In Finland there are special provisions concerning shore areas. In shore areas, landowners have a right to draw up a proposal of a detailed shore plan. Therefore landowners may take charge of drawing up a proposal for the detailed shore plan of the shore areas they own. Before the process begins, the local authority must be contacted and provided with a participation and assessment scheme. The provisions concerning planning procedure and interaction in case of shore areas otherwise apply to the processing of a local detailed plan proposal (LUBA § 74). However, even if a private landowner will deliver the shore plan proposal, the municipality can still refuse to adopt the plan.

In Poland every landowner has a right to develop, according to the local plan, or without the local plan according to the decision on conditions of site development (the mechanism will be discussed in more detail in the following chapter, see also Appendix B, p.289-292). It is assumed that one cannot deny the owner the right to develop his/her real estate when the intended use of the real estate complies with the conditions set out in the local plan (or in the absence of a plan – with decision on conditions of site development). A refusal may be issued only if the intended use of land should infringe public interest that is protected by law or a third party's interest.

According to LUPDA (art. 2.4) public interest in Poland should be understood as generalized aspirations and actions taking into account the needs of the society and local communities related to the spatial development. The protection of public interest should be first of all assessed with respect to the permissibility of intended use of land in view of the implementation of public interest projects. Under art.2.5 LUDPA, a public interest project is any action of local (municipal) or supra-local (county, provincial or national), which are designated to achieve any of the purposes set out in art.6 of the Real Estate Management Act. Under art.6 of the Real Estate Management Act the purpose of these actions should aim to develop broadly understood public infrastructure, whether technical (water supply, sewage disposal, public roads, but also air traffic, control infrastructure, etc.) or social (schools, community assistance centres, and hospitals, etc.,) and infrastructure that protects against harmful environmental impacts.

The protection of a third party's interest refers to deprivation of access to public roads, the use of water, sewage, electricity or heat, communication, as well as access to day light in

facilities designed for people, exposure to nuisance caused by noise, vibration, electrical interference and radiation, and finally pollution of air, water and soil. (art. 2.7 Regulation of Ministry of Infrastructure concerning signs and naming used in the decision on conditions of site development, 2003)

In Poland, costs of planning procedures at the local level are the responsibility of municipalities. According to the provision of law the plan itself can be commissioned (ordered) and financed by the public authorities. Only in cases of public investment, the investor is financing the plan. The private, commercial developer has neither the right to organize/produce nor to finance plans. In practice some informal solutions have been developed concerning the participation of the developer in the cost of land-use planning.

In Finland, landowners often start negotiations concerning the development of an area and sign a land use agreement with the municipality. However, planning monopoly belongs to the municipality and the municipality can refuse to start the planning. Land use agreements may be used to agree on development costs and other mutual rights and obligations of the parties to the agreement (LUBA § 91b). The land use and development agreements were not mentioned in the legislation before 2000 although they have been used often. The law currently in force states that the land use agreements made by a local authority regarding planning and implementation of plans shall not override the objectives and content requirements of planning laid down in the planning law. A land use agreement binding both parties can be made only after the plan draft has been publicly displayed. This does not apply to agreements that concern starting the planning process. (LUBA § 91a)

In Finland, according to the provision of LUBA, the private developer may finance the detailed plan preparation and participate actively in the plan preparation. Therefore land development contracts usually involve an active cooperation of the land owners or the private developers in land use planning process. The law states that in the land use agreement the rights and obligations of the parties can be defined more widely than the provisions concerning development compensation stipulate (LUBA § 91b). It means that it can contain also other arrangements for co-operation, also in planning.

Section 91b of LUBA concerning land use agreements provides the following:

“A local authority may enter into agreements on planning and implementing plans (land use agreement). However, land use agreements cannot be binding on the content of plans.

A land use agreement that is binding on the parties to the agreement can be made only after the draft plan or proposal has been publicized. This does not apply to agreements to initiate planning.

Notwithstanding the provisions of this chapter on development compensation, land use agreements may be used to agree more comprehensively on the mutual rights and obligations of the parties to the agreement.

A land use agreement shall be publicized in conjunction with drawing up the plan. The intention to agree on land use must be publicized in the participation and assessment

scheme. If the intention to agree on land use becomes known only after the participation and assessment scheme has been drawn up, it must be publicized in conjunction with the drawing up of the plan in a manner that best serves the purpose of informing interested parties.”

However, the legitimacy of early (preliminary) agreements between developer and municipalities and decisions on the contents of the plans, may be however questioned, in the later stage of public participation. There are tensions between preliminary agreements and schemes on the one hand, and public inclusiveness and accountability, on the other hand (Mäntysalo & Saglie 2009).

In Poland, planning is the so-called ‘own task’ of the municipality. There are no regulations concerning co-operation in financing the spatial plan and land use agreements in spatial planning law. Therefore the cooperation in land development between private developers/landowners is not supported by planning law. The first projects which were regarded as the beginnings of PPP (Public-Private Partnership) emerged in Poland in the 1990s. The initial cooperation projects concerned the construction or improvement of technical infrastructure facilities, and were mainly small infrastructural investments implemented by local governments. Large projects concerned mainly motorways. The A2 Konin–Nowy Tomyśl motorway built and opened in 1993 by Autostrada Wielkopolska SA is an example of public-private co-operation. However, at that time, the institution of public-private partnership did not formally exist within the legal system. This situation created a high risk for both public and private partners. In October 2005, the principles of public-private partnership in Poland finally became defined. The new law was introduced together with related executive acts. However, the law has not been used in practice, so its implementation may not be considered a success⁸⁸. The new law was highly criticized, starting with the definition of public-private partnership or lack of clear definition of public interests, the concept of “prevailing benefit” and particularly its quantitative measurement or the requirement to prepare a profitability analysis, especially in the case of smaller projects. (Załączna & Tasan-Kok, 2009)

However, the cooperation between private and public sector (PPP) in land development in Poland is an emerging trend. Research made for example by (Załączna & Tasan-Kok, 2009) shows that currently in Poland many municipalities are searching for private partners for the implementation of joint projects.

The legal system for co-operation with private developers in land development exists in Finland. In Poland it is still not the issue which legislators pay particular attention to. The co-operative line of planning which refers to the methods of land development chosen in this study is not supported by the planning legislation in Poland.

The main difference between the systems in both countries refers to the fact that in Poland private landowners have a right to develop. In Finland the planning monopoly of

⁸⁸ According to the act, projects that had been implemented before the act came into force or projects underway on the day of enforcement could not be classified as PPP, even if cooperation of public and private entities was stipulated by other regulations. Due to the fact that the preparation of a project under PPP takes a lot of time, such projects have not officially been implemented in Poland.

municipalities limits the possibility of development in privately owned land. In cases of development in bigger areas in Finland, developers usually co-operate with a municipality at the stage of the detailed plan elaboration.

7.4 Municipal right to allocate land

In Finland, land can be transferred from the municipality to a private landowner without a public tender process. Therefore, municipalities decide on the price and the area, which could be transferred to other parties.

In Poland, by law, The State Treasury and local authorities in general can offer land (also other real estates) for sale via a public tender process, the principles of which are laid down in the Regulation of the Council of Ministers, 13th February 1998 and Chapter 4 of AREM. These regulations set out detailed rules and procedures for the disposal of real estate owned by the State Treasury or the municipalities. Departures from mandatory public tender procedures are allowed only in cases strictly enumerated in statutory law.

Under art.13 of AREM, real estate owned by The State Treasury and local authorities in Poland can be traded. In particular, real estate may be subject of sale, exchange, the perpetual usufruct, lease, permanent management, and limited property rights. Real estate owned by The State Treasury and local authorities can be used as contribution in kind to companies and state-owned companies, as well as foundations. The perpetual usufruct right may also be the subject of contribution to the created company. Real estate owned by The State Treasury and local authorities can also be donations for public purposes, and also the subject of donations made between the State Treasury and the body of local self-government, as well as donations made between local self-government bodies. However, under art. 28 and art. 37 of AREM, sales of real estate or disposing land in the form of perpetual usufruct is possible in two ways via a public tender process or without the public tender process.

Real estate owned by The State Treasury and local authorities can be transferred (sold or transferred in the form of the perpetual usufruct) without public tender process, in the following situations (art.37 of AREM):

- 1) the real estate is transferred to a person entitled to priority in the acquisition
- 2) disposal takes place between the State Treasury and the body of local self-government, and between local self-government
- 3) the real estate is transferred to the individuals and legal entities which are engaged in charitable activities, care, cultural activities, therapeutic care, education, science, sports activities, for other purposes unrelated to profitable activity
- 4) disposal concerns exchange or donations
- 5) sale of the real estate is to its perpetual user
- 6) disposal concerns the real estate, or a part thereof, which may improve the management of the adjacent real estate, which is owned by a person who intends to acquire the real estate or part of it, and if it cannot be developed as a separate real estate;
- 7) real estate is given as a non-monetary contribution to the new created state or local government legal person, or created foundation

- 8) the real estate is transferred to management of a special economic zone, in which real estate is located
- 9) disposal concerns the part of the real estate to the other joint owners of real estate;
- 10) disposal concerns churches and religious organizations, which have regulated relations with the country
- 11) the real estate is sold to a private partner or a company referred to in art. 19.1 of the Public-Private Partnership Act of 28 July 2005, as an own contribution of a public body, to carry out the public investment projects through public-private partnership, with restriction to art.25 of the Public-Private Partnership Act of 28 July 2005. Under art.25 of the Public-Private Partnership Act of 28 July 2005, after the completion of the contract partner or private company forward back asset under the implementation to the public body or state or government legal entity established on the basis of separate laws.
- 12) the real estate is transferred to delegations or diplomatic consular offices of foreign states

In addition, the Marshal of the region in relation to real estate owned by the State, or the relevant council for the real estate owned by the local government units, by ordinance or resolution, may exempt from the obligation to dispose of the real estate via the public tender process if:

- 1) real estate is designated for housing, technical infrastructure or other public purposes, if these targets will be implemented by the entities for which they are statutory objectives and whose income is used for statutory activities
- 2) the sale of real estate is to the person who rents the real estate on the basis of an agreement for at least 10 years and the real estate has not been built on the basis of an authorization for the construction (art.37 of AREM)

Therefore real estate may be for instance released from the obligation of organizing the public tender process if for example the potential usufructuary is an entity whose statutory aim is to develop residential real estate and all its income is used for this purpose. In other cases the tender process is necessary for both transfers: the sale of ownership rights and perpetual usufruct rights (art. 37.1 AREM). The municipality is required to inform the public as to the properties available for sale or let, and about the date and terms of bids (art.38 of AREM). The municipality should provide detailed information about the property, including for example:

- a description of the property and its designated use under the local development plan
- the development required and the dates of commencement and completion of construction
- the form of sale
- the sale or rental price

When offering land for sale or use, a municipality is obliged to specify its designated use as set out in a local plan. This gives investors certainty that a certain project can be carried out on the selected site. The starting price cannot be lower than the valuation of the property made by a certified valuation expert. The law provides for a departure from this rule (with a maximum reduction of 50%) only in the case of the sale of structures listed in the register of historical monuments. In order to participate in the public bidding process, the investor must pay a deposit within a time limit specified by the organizer. The outcome of the bidding

process is the basis for entering into a notarial deed of sale for the property or for a contract to grant the right of perpetual usufruct to the land.

Therefore the role of the municipality in relation to land development processes in Poland is in a sense limited by the obligation to organise a public tender process. In Finland a municipality has to, of course, follow the statutory rules concerning how they should represent the community (principles and values which must be taken into consideration), but there are no obligations to organise a public tender process in cases of allocation of land. It could also be added here that European Union regulations should be taken into consideration when discussing the practice of land development. Even though, this fact is mentioned here it is not in the scope of this thesis. Therefore no further discussion on this point will be developed.

7.5 Public participation in planning procedure

According to the provision of law in Finland, the planning procedure has to be organised in such a way that all interested parties have an opportunity to participate in preparing the plan, estimating its impact and state their opinion on it, in writing or orally (LUBA § 62). Plans must be prepared in interaction with such persons and bodies on whose circumstances or benefits the plan may have substantial impact on (LUBA § 6). When a plan is being drawn up, a scheme covering participation and interaction procedures and assessment of the plan's impact must be drawn up in good time, as required by the purpose and the significance of the plan. The initiation of the planning process must be publicized so that interested parties have the opportunity to obtain information on the principles of the planning and of the participation and assessment procedure (LUBA § 63). When the plan is drawn up, special meetings with interested parties may be organized, where the material used in plan preparation is available and interested parties have an opportunity to provide their opinion (LUBD §30). Before the plan proposal is made available to the public, interested parties have the opportunity to propose negotiations to the regional environmental centre on the adequacy of the participation and assessment scheme. The planning proposal is placed for public display for a period of at least 30 days (LUBA § 65, LUBD §§ 19, 27). Local residences have a possibility to present their opinion and objections within the proposal's availability period (LUBA § 65, LUBD §§ 19, 27). The municipality's reasoned opinion on the objection shall be made known to objectors who have so requested in writing and, at the same time, provided their address (LUBA § 65). The decision to approve a plan must be sent immediately to those members of the municipality and objectors who so requested (LUBA § 67). The plans only come into force when it has been made available to the public (LUBA §200).

Participation of the public in planning procedures concerns all plans in Finland. In addition also street plans are the subject of public display and discussion. The same procedure is also applied when the plan is amended.

In Poland, during the local plan or the framework study elaboration procedure, people have a possibility to send a proposal to the plan, participate in negotiations in the form of a public discussion over the accepted solutions in the draft plan, and finally to lodge any objections against provisions of a plan, (so-called "comments").

After a resolution is undertaken by the municipal council to proceed with drawing up a framework study or a local plan, the mayor should announce in the local press and by notice, as it is customary in the locality, about adoption of a resolution to proceed with drawing up the framework study, specifying the form, place and date for the submission of proposals for a framework study. The period to submit the proposals should not be less than 21 days from the date of the announcement (art. 11, art. 17 LUPDA). The mayor should announce that the draft of the framework study will be available for public inspection at least 14 days before the public display and display the framework study for public inspection for a period of at least 30 days and organize at that time public discussions on the solutions adopted in the draft of the framework study. In cases regarding a local plan, the mayor should announce at least 7 days before about public display of the draft plan. The mayor should display for a period of at least 21 days the draft plan of the local plan to the public together with an estimation of its environmental impact and organize at this time a discussion concerning solutions adopted in the draft of the local plan. In the case of the framework study the mayor should announce in the notice the period, which is not shorter than 21 days from the date of completion of the public display, within which the legal and physical person and organizational units without legal personality can give comments on the draft framework study. In cases regarding the local plan the mayor should designate the period (not shorter than 14 days from the date of the end of the pledge of the plan) within which individuals, legal entities and organizational units without legal personality can present comments concerning the draft plan. The proposal and comments to the draft of e.g. a local plan can be submitted by anybody. (art. 11, art. 17, art. 18.1 LUPDA)

These are the main elements of public participation according to the provision of the current act. The development of public participation in planning seems to be going in a good direction in Poland. The law of 1994, which came into force in 1995, introduced the new mechanisms of public participation in the planning procedure. However, the Act of 1994 did not prescribe public participation in the preparation of regional plans or the obligatory study at the municipal level (see Appendix B, p.269-270). In practice the participative procedure was very often employed in the elaboration of these two plans and has local media coverage, however, it was not required by law (Larsson 2006). The law of 1994 prescribed that only the local plan is the subject to public participation. LUPDA 2003 has improved the public participation in elaboration of the plans, extending the scope of public participation to all plans at local levels.

The situation in both countries is such that the proposal and comments (Poland) or the opinions and objections (Finland) to the draft of plans may be submitted by anybody. However, refusal to consider them does not create a possibility to appeal to the court. During the preparation of the plan, a public discussion of plan provisions should take place, but its outcome is not binding for the municipality. The interested parties can appeal the already adopted plan.

7.6 Summary of delineation and allocation of rights

In the table below the distribution of rights in property rights regimes is contrasted in relation to the position of the municipality in the development process.

Table 14. Position of the municipality in the development process

<i>Finland</i>	<i>Poland</i>
<i>The position of the municipality versus government representations in the spatial planning system</i>	
The right to levy municipal income tax	Share of taxes allotted to the State budget
Planning monopoly, only consultation with the state authority. (The authorities whose sphere of activity the plan may concern are invited to the negotiations)	The approval mechanisms as a tool to serve to implement governmental and regional policies
<i>The balance of rights between private landowners and the municipality</i>	
Planning monopoly, as a rule municipality set up the development possibility, municipality can refuse to plan the area, also reminders to build can be issued by municipality	Every landowner has a right to develop, according to the local plan, or without the local plan according to the decision on conditions of site development
Land use agreements made between private landowners and a local authority regarding planning and the implementation of plans	Planning work is entirely a municipal responsibility
<i>Municipal right to allocate land</i>	
Municipality can allocate land and set up the land prices	Public tender process
<i>Public participation in planning procedure</i>	
Before the plan proposal is made available to the public, interested parties have the opportunity to propose negotiations to the regional environmental centre on the adequacy of the participation and assessment scheme	Participation starts when people have a possibility to send the proposal to the plan

The delineation and allocation of rights in relation to the first explanatory variable can be linked to methods of land development. We can anticipate how institutions affect the mechanism of land development processes. The marginal role of Polish municipalities are not surprise. The position of Polish municipalities in land development process in comparison to Finnish municipalities is much weaker. The incentive system for municipal land development starts to differ when looking at the distribution of rights given by the financial system. The main differences between the systems in both countries relates to the right to make an independent decision concerning land development issues (planning monopoly - the right to decide how land will be developed and the right to decide by whom land will be developed) and the right to develop versus ownership rights. Finnish municipalities have a so-called planning monopoly, which is understood in the way that they have the right to decide about content and areas covered by land-use plans elaborated at a local level. In Poland, the approval mechanism plays an important role in the land use and development system. In Poland, every landowner has a right to develop, according to the local plan, or without the local plan according to the decision on conditions of site development. In Finland, as a rule

the municipality sets up the development possibility. It is not surprise that the main actor in land development process in Finland is a municipality, in Poland private land owners. In addition, the co-operation between public and private sectors is encouraged by law in Finland.

Chapter Eight

THE BALANCE BETWEEN FLEXIBILITY AND CERTAINTY IN DEVELOPMENT CONTROL

This chapter will compare approaches developed in Poland and Finland towards the scope of development control. The following issues will be discussed and compared in particular: the hierarchy of planning documents, the right to develop, and availability of instruments to control development.

8.1 The hierarchy of planning

The spatial planning system in Finland is hierarchical with different levels of land use planning. A plan drawn on more general lines guides the drawing of a more detailed plan but a more general plan is not valid in an area with a more detailed plan.

Government authorities must take national land use objectives into account, promote their implementation and assess the impact of their actions on local structure and land use (LUBA § 24). In regional and other land use planning, national land use objectives must be taken into account in a way that promotes their implementation. The regional plan shall be used as a guideline in drawing up and amending local master plans and local detailed plans, and when any other measures are taken to organize land use (LUBA § 32). The local master plan shall be used as a guideline in drawing up and amending local detailed plans, and when any other measures are taken to organize land use (LUBA § 42). There is not an ongoing discussion concerning the lack of hierarchy in spatial planning (Werdi, 2009), but there are comments that the present system is much too complicated and ineffective.

In Poland, the spatial planning system is the subject of critical concern over the lack of hierarchy or quasi-hierarchy (Jędraszko, 2005, p. 249-253, Izdebski *et al.* 2007). Izdebski *et al.* (2007, p.12) emphasized that co-ordination in the Polish system is provided by the approval mechanism instead of legislation and planning documents. In comparison to Finland the presented system of approvals seems to be complicated.

However, there are also elements of planning hierarchy in the Polish legislation, which binds the municipality while preparing spatial development plans. For example article 9.2 of LUPDA states that the mayor draws up framework studies taking into account the principles set out in the Concept of National Spatial Development, the Strategy for Regional Development and Regional Plan, and the development strategy of the municipality, if the municipality has such a strategy. Article 11.4 of LUPDA also states that the mayor, following a resolution undertaken by the municipal council to proceed with drawing up a framework study, prepares a draft of a framework study, taking into account the Regional Plan, or in the absence of the Regional Plan or lack of the incorporation into the Regional Plan the governmental tasks, the mayor should take into account the programs defined in article 48.1 of LUPDA. Article 48.1 of LUPDA provides that ministers and central bodies of government within its factual jurisdiction draw up programs which include the governmental tasks for the purpose of a public investment of national importance, hereinafter referred to as 'programs of investment of national importance'. Article 44 of LUPDA states that the findings of the Regional Plan should be included into the local plan after arrangements concerning the terms

and conditions of incorporation of public investments projects of national, regional and county importance into the local plan are made. The arrangements are carried by the Marshal of the Region with the mayor.

The findings of the framework studies are binding on the municipality in preparing local plans (art. 9.4 LUPDA). Article 17.4 of LUPDA states that the mayor prepares a draft of the local plan together with an estimate of the environmental impact, taking into account the provision of the framework study. According to article 20.1 of LUPDA, a local plan is to be adopted by the municipal council after its compliance with the framework study is ascertained. Entry into force of a local plan results in invalidity of other land use plans relating to the subject area (art. 34.1 LUPDA).

However, it is stressed for example by Jędraszko (2005, p. 249-253) and Izdebski *et al.* (2007) that the above listed planning documents do not create, through the regulations provided by LUPDA, an integral system. The arguments are concerned mainly with the lack of legally binding status of the provisions of the framework study, a phenomenon called ‘duality’, the lack of obligation to elaborate the local plans and as mentioned already earlier the complicated approvals mechanism system.

In Poland, the framework studies are not an act of local law (art. 9.5 LUPDA). In the situation when there is no local plan, the framework studies cannot constitute the base for issuing the decisions on conditions of site development (see Appendix B, p.279-282). There is no legal basis to refuse to issue the decisions on conditions of site development in the case of non-compliance of the proposed activity with the provisions of the framework study. The determination of the decisions on land development conditions is based solely on the law relating to the subject and land covered by the decision.

Jędraszko (2005, p.93-94) highlights, that on the two planning levels: regional and municipal level, there is a strong phenomenon called ‘duality’. This duality is expressed in the fact that development strategies and the land use plans / studies are developed by different groups of authors (teams), according to different methodologies and at different times. These teams are supervised by different institutions at the regional and local levels, which lead to reconciliation and acceptance of these documents to different modes. The obvious consequence of this practice is the lack of cohesion (integration) between these planning instruments. The fact of integration of these documents is so rare, that if it happens it is rewarded by the minister. Therefore, Jędraszko alleged that there is a lack of integration in the spatial planning system in the sense of interdependence of concepts included in the plans.

In addition Jędraszko highlights the importance of the so-called ‘principle of option’ in the elaboration process of land-use plans. Principle of option means that there is no obligation imposed by law to elaborate the plan. According to Jędraszko LUPDA has introduced a policy of option, except for a specific set of cases. However, if we take a closer look at LUPDA, this is only true in the case of the local plan. With regard to the regional plan and the concept of national spatial development LUPDA states that these documents are drawn up by relevant authorities (art. 38, art. 47.1 LUPDA).

More precisely, article 38 of LUPDA states that self-government authorities at the regional level shall draw up a plan for land use of the province (regional plan), conduct analysis and

studies and develop concepts and programs relating to the areas and problems of land use according to the needs and objectives undertaken in this area of work. Article 47.1 of LUPDA states that the Government Centre for Strategic Studies taking into accounts the objectives of the government's strategic documents, draws up a concept of spatial land management, which takes into account the principles of sustainable development based on natural, cultural, social and economic conditions. Therefore there is an obligation to draw up plans for the national level and regional levels. Otherwise for planning documents at a municipal level, where it is not at all an obligation to draw up the local plans. LUPDA provides only about the procedure of local plan elaborations (art. 9.1, art. 14.1 LUPDA). The local plan shall be drawn up only if required by separate regulations (art. 14.1 LUPDA). With regard to framework studies, at the end of LUPDA we can find that municipalities adopt the framework study within a year after the law comes into force.

Jędraszko (2005, p. 253-254) highlights that the clearly planned hierarchical system in Poland has been replaced by a quasi-hierarchical system. According to him a quasi-hierarchical system is based partly on the duty to take into account the arrangements of plans at the higher level, and partly on the complicated system of the approvals mechanism.

8.2 The right to develop

In Finland, the general rule is that each significant development project in urban areas requires a local detailed plan. Development without a plan is a rare exception in urban areas. (Viitanen *et al.* 2003, p.55)

The development control in Finland is an administrative procedure based on a permit system. When the application for a building permit fulfils the obligations imposed by law, the permit must be granted (judicial discretion). In principle, in Finland the local detailed plan controls building in dense settlements. Furthermore the construction process requires a building permit⁸⁹ (LUBA § 125). The role is also that buildings may not be built in violation of the local detailed plan (LUBA § 58). A building permit may also not be granted if it hinders implementation of the local master plan⁹⁰ (LUBA § 43).

When special cause exists, municipalities in Finland may grant a right to deviate from the provisions, regulations, prohibitions and other restrictions issued in or under LUBA concerning building and other actions. The municipality may not, however, grant a right to deviate: 1) in the case of construction of a new building in a shore area where the local detailed plan or a legally binding local master plan is not in force; 2) in the case of greater than minor deviation from the gross floor area permitted in the local detailed plan; 3) in the case of deviation from a plan regulation on the conservation of a building; or 4) in the case of deviation from a building prohibition issued for the purpose of approving a local detailed plan. In these cases the right to deviate may be granted by the regional environmental centre.

⁸⁹ Other permits include, e.g. action permits, demolition permits or landscape-work permits

⁹⁰ There are exceptions described by LUBA § 43 when the permit shall be granted. This includes the situation that would cause substantial harm to the permit applicant and the local authority. It is a so-called money or permit principle.

A right to deviate may not be granted concerning provisions on the landscape-work permit or the special conditions of a building permit in areas requiring planning. (LUBA § 171)

The municipality and the regional environmental centre may grant a right to deviate, meaning that there is so called ‘expediency consideration’ or ‘consideration of points of expediency’ (tarkoituksenmukaisuusharkinta), which allows refusal to grant a right to deviate.⁹¹

In addition, in Finland deviation shall not impede planning, the implementation of plans or other organization of land use, hinder attainment of the goals of nature conservation or hinder attainment of goals concerning the conservation of built environment. A right to deviate may not be granted if it leads to building with substantial impact or if it has other substantially harmful environmental or other impact⁹². (LUBA § 172) A right to deviate is not of significant importance for the development of projects in urban areas (see Figure 10.).

Before a matter concerning deviation is resolved, neighbours and others on whose life, work and other circumstances the project may have significant impact on shall be given the opportunity to make a written objection. The local authority shall notify neighbours and other aforementioned parties of applications at the applicant's expense. Before a matter concerning deviation is resolved, the opinion of the regional environmental centre, some other State authorities or the regional council must be obtained, if necessary, when the deviation has substantial bearing on their sphere of authority. When deviation has substantial bearing on land use in a neighbouring municipality, its opinion must also be obtained. However, an opinion shall always be requested from the regional environmental centre when deviation concerns: 1) areas covered by special national land use objectives; 2) areas important to nature conservation; 3) sites, building or areas important to the conservation of buildings; or 4) areas reserved in the regional plan for recreation or conservation purposes. (LUBA § 173)

The law states also that under the condition of deviation provided by LUBA the local building supervision authority may grant building permission in the cases of minor deviation from provisions, regulations, prohibitions and other restrictions concerning building. In addition, minor deviation from the technical and corresponding requirements of a building requires that the deviation does not set aside the essential requirements of building. (LUBA § 175)

⁹¹ If stated “may” (“voi” in Finnish) in LUBA there is the type of consideration of the points of expediency.

⁹² After getting the right to deviate, the building permit is also needed.

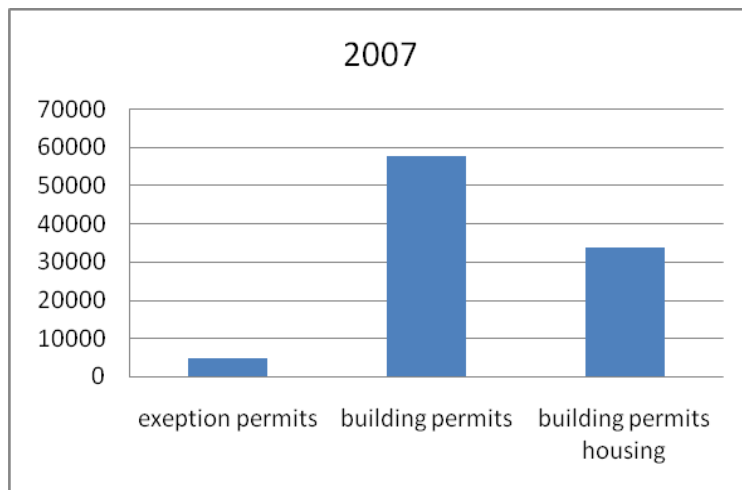


Figure 12. Number of building permissions versus exceptional permits in Finland in 2007. Source: Statistic Finland, Rakentamisen toimialakatsaus III/2007.

In local detailed plan areas in Finland, the suitability of a building site is resolved in the local detailed plan. In the areas outside the areas covered by the local detailed plan there are special requirements concerning development possibilities. The law states that if the suitability of a building site is not resolved in the local detailed plan then the building sites must be appropriate for the purpose, fit for construction and sufficiently large, at least 2000 m². Buildings must also be located at a sufficient distance from a neighbour's land. (LUBA § 116)

Preconditions for a building permit outside local detailed plan areas in summary involve:

- the building sites must be appropriate for the purpose, fit for construction and sufficiently large, at least 2,000 m²
- when the appropriateness and fitness for purpose of a building site are considered, care must be taken to ensure that there is no danger from flood, earth or rock fall, or landslide
- it must be possible to locate buildings at a sufficient distance from the boundaries of the property, public roads and a neighbour's land
- a building must fit into the built environment and landscape, and must fulfil the requirements of beauty and proportion. A building must meet the essential requirements for structural strength and stability, fire safety, hygiene, health and environment, safety in use, noise abatement, and energy economy and insulation, as set by its intended use (essential technical requirements). A building must conform with its purpose and be capable of being repaired, maintained and altered, and, in so far as its use requires, also be suitable for people whose capacity to move or function is limited. In repair work and alteration, the attributes and special features of the building and its suitability for the intended use must be taken into account. Alterations may not endanger the safety of the building's users or weaken their health conditions. In addition, construction must in any case comply with good building practice:
- the local authority does not incur any special expenses from road construction or organization of water supply or drainage
- the building is appropriate for the location concerned
- a serviceable access road to the building site exists or can be arranged

- water supply and waste water management can be organized satisfactorily and without causing environmental harm
- the building will not be located or constructed in a way that causes unwarranted harm to neighbours or hinders appropriate building on a neighbouring property
- the local authority does not incur any special expenses from road construction or organization of water supply or drainage
- any restrictions based on the regional plan or the local master plan, as the building restrictions or other restrictions on building and actions⁹³, are taken into account (LUBA §§ 33, 43, 116, 117, 135, 136)

In the case of shore areas or areas requiring planning, the local master plan may be used as grounds for a building permit (LUBA §44). However, building activities shall not lead to construction of major significance or cause substantially harmful environmental or other impact (LUBA § 137).

In Poland, the situation developed rather differently. Building permission may be granted on the basis of the binding local plan or, if such a plan does not exist, a decision on conditions of site development (art.59.1 LUDPA), and a statement that the land is available for the developer to start the construction.

Thus, if there is no local plan, the development can take place under certain conditions and a decision on conditions of site development can substitute the local plan. However, the local plan can in a creative way decide about future land use. Decisions on conditions of site development can only be based on existing law and analysis of the neighbourhood regulated by law.

There are two different kinds of decisions on conditions of site development:

- 1) Decision defining the location of public interest projects (art.50.1 LUPDA)
- 2) Decision on land development conditions (art.4.2. art.59.1 LUPDA)

The decision on land development conditions may be issued⁹⁴ only when all of the following conditions are met:

1. at least one adjacent plot, that is accessible from the same public road, must be developed in a way to enable requirements to be laid down for the new developments as regards the continuation of: functions, parameters, features and indicators of development and land use as well as dimensions and architectural form of buildings and facilities, the building (setback) line and the building density (this is so-called good neighbour principle)
2. the plot must have access to a public road
3. the existing or projected infrastructure must be sufficient for the purposes of the project concerned

⁹³ The municipality may impose a building prohibition and restrictions on actions in the area for a maximum time of five years during the drafting of the local master plan and for a maximum period of two years during drafting of the local detailed plan. The building restriction may be conditional when the denial of the building permit causes substantial harm to the applicant, and the local authority or, when the area should be considered reserved for its needs, some other public entity does not expropriate the area or does not provide reasonable compensation for the said harm. (LUBA § 33, 38, 53)

⁹⁴ The decision on land development conditions is not needed in cases where there is a local plan

4. no permission is required for removal of land from agricultural or forestry use, or such permission was issued during elaboration of local plans that have already expired
5. the decision is compliant with other specific regulations (e.g. the Act on Environmental Protection, the Act on Protection of Forests and Agricultural Land, the Act on Historical Monuments Protection) (art.61.1 LUBPA)

Under art. 61.5 LUDPA, the requirements of sufficient existing or projected infrastructure, is deemed to be met if development of such infrastructure is ensured in an agreement between the relevant unit and the investor. The decision on land development conditions is issued by the municipal administrator, mayor or city president after all required approvals are obtained. (Art.60.1 LUBPA)

The issuing of the decision defining the location of public interest projects depends on the importance of the public interest project. In cases of public interest projects of national and regional importance, decisions are issued by the mayor in cooperation with the Marshal of the Region. In cases of public interest projects of county and local importance, decisions are issued by the mayor. (art.51.1 LUDPA)

The decision defining the location of public interest projects are issued on application by the investor (art.52.1 LUDPA). The decision defining the location of public interest projects binds the authorities in connection with its issuance of a building permit (art.55 LUBPA). A public interest project may be refused to be sited if it complies with other laws. However, it cannot be refused to determine the location of the public investments project, if the investment plan is in accordance with other law provisions (art.56 LUDPA).

In the proceedings related to the issuing of the decision defining the location of public interest projects, the competent authority is undertaking analysis in relation to: terms and conditions of land use and development resulting from the separate regulations, as well as the factual and legal situation of land on which the investment is going to be implemented (art.56 LUDPA).

The application for a decision on conditions of site development should include for example information on: the boundaries of the plot, which must be indicated on a copy of the basic map or, if such document is unavailable, a copy of the cadastral map, indicating the referred to plot and the area where the investment is to take place (scale of 1:500 or 1:1000), but 1:2000 for line investments; investment characteristics defining requirements on water, energy and waste disposal/treatment, as well as other needs concerning technical infrastructure and, where necessary, methods of rendering waste harmless, characteristics defining planned ways of developing the land, type of structure and development, including purpose and dimension of structures (information to be submitted in written and graphic form), type, scale and location of project.

According to §3 of the Regulation on the Determination of Requirements Relating to New Developments and Land Uses in Areas Where No Local Plan Exists of 26th August 2003, before the decision on conditions of site development is issued, the competent authority must designate a survey area around the building lot concerned and conduct a survey on functions and features of developments in terms of the requirements set out in art.61.1-5 LUDPA. The boundaries of such survey areas must be marked on a copy of the base map (plat) and must be at a distance of at least 50 meters. Based on the outcome of the survey, the requirements

regarding the new development are then set out in the decision on conditions of site development.

Several decisions on land development conditions for a number of applicants can be issued for the same property (art.63.1 LUDPA). Anyone can lodge a motion for issuance of such decision. A copy of each should be handed to all the applicants and the owner or user of the real estate. If one of the applicants has been granted building permission the other decisions are declared to have expired. The decision on land development conditions does not confer rights to the area or prejudice the legal title or rights of the third parties (art.63.1 LUDPA).

Decisions on land development conditions do not always translate into building permissions. As anybody (and not only the landowner) may apply, land development conditions are subject to speculative trade – which happened in particular during the last housing boom. (Havel & Załączna, 2009)

In 2005 32,900 applications for a decision defining the location of public interest projects were submitted (data does not include Warsaw, where till the end of 2004 5, 800 applications were submitted). About one per cent of applications were refused. In 2005 185,000 applications for decisions on land development conditions were submitted (data includes Warsaw). About 2,8 per cent of the applications were refused. Decisions on land development conditions concerning housing construction (84.900) accounted for slightly more than half of all decisions made. In principle issuing of the decisions on conditions of site development is carried out without delays. In 2005 the number of applications for the decisions on conditions of site development has even increased. (Report of the Polish Ministry of Infrastructure of 2007)

The situation in respect of spatial planning in municipalities is often discussed as unsatisfactory (Report of the Polish Ministry of Infrastructure of 2007). The number of decisions on land development conditions in comparison with the number of building permits shows how often construction investment activities occur in areas not covered by plans – see Figures 13-14.

The charts bear witness that building in areas with no land-use plan has become a norm. The system of issuing the decisions on conditions of site development was criticized as pathology (Jędraszko 2005, Drzazga, 2006, Izdebski *et al.* 2007).

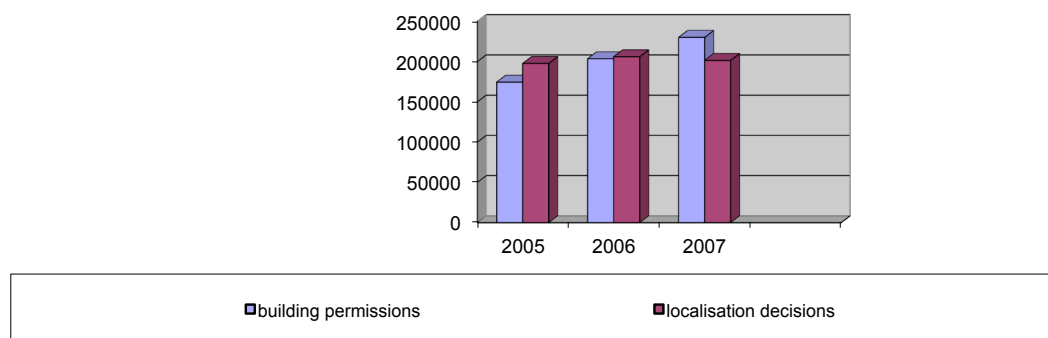


Figure 13. Number of building permissions versus decisions on conditions of site development in Poland in the years 2005-2007. Source: Central Statistical Office

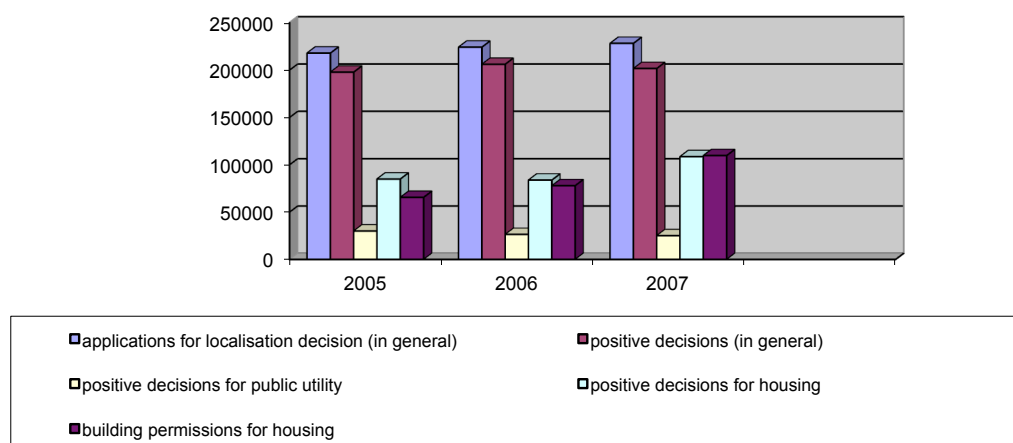


Figure 14. Analysis of building permissions and decisions on conditions of site development in Poland in the years 2005-2007. Source: Central Statistical Office

According to the provision of law in Poland, the owner of real estate in the most absolute manner but within the limits laid down by legal regulations and regarding the principles of social intercourse, can use the property in accordance with the socio-economic purpose of his right, and in particular may enjoy and receive profits of the property (CC atr.140). Within the same limits the owner may dispose of his property. In fact every landowner has a right to develop, with or without plan. The municipality has limited possibilities to stop the landowner.

Article 64 of the Constitution of the Republic of Poland of 2 April 1997 became the subject of interpretation in practice. Interpretation of this article is of fundamental importance for the spatial management in the country. According to the proponents of the neoliberal approach to market, property rights in Poland have an absolute character, and should not be subjected to any restrictions. This means that real estate owners can freely change the use of real estate in any place and at any time. The tasks of public authority should be limited to approval of construction projects of proposed changes. The opinions concerning this topic are, however,

different in Poland. The law on spatial planning in Poland poses no clarity in this field. (Jędraszko, 2005 p.61)

LUPDA confirms that every landowner has a right to develop according to the local plan, or without the local plan according to the decision on conditions of site development. No one can deny the owner to develop his real estate when the intended use of the real estate complies with the conditions set out in the local plan or in the absence of a plan – with decision on conditions of site development. A refusal may be issued only if the intended use of land should infringe public interest that is protected by law or a third party's interest.

8.3 Availability of instruments to control development

In Finland, the local master plan may be legally binding or not (LUBA § 45). The legal effects of the binding local master plan include restrictions on building and other actions in the special protection areas designated in the plan. A building permit cannot be issued in contradiction to the master plan. In the local master plan in Finland the necessary protection regulations may be issued for an area or building requiring protection due to its landscape, natural values, built environment, cultural and historical values or other special environmental values. These protection regulations may be made legally binding depending on the choice made by the municipality.

In Poland the municipal council may determine the spatial policy in the municipality, including the need for local land use planning, with a framework study (art. 9.1 LUPDA). Framework study sets out the preconditions and directions of spatial development for the entire municipal area (art. 9.3 LUPDA). The framework study should be prepared by every municipality for its whole area. The framework study binds the municipal authorities when preparing local plans (art. 9.4 LUDPA). However, it should be emphasised that the framework study is not an act of law (has no legal obligations for third parties). Therefore, it cannot fully direct the land policies in the cities, in cases where there is no local plan, because in practice framework study cannot constitute the base for issuing the decisions on conditions of site development. The number of enacted local plans is also unsatisfactory and the municipal planning activities remain at a low level (Report of the Polish Ministry of Infrastructure of 2007).

Below, other restrictions to prevent land development processes will be discussed in both countries. In Finland there are also special restrictions to prevent undesired development. The area may be marked by the municipality or become by law an area requiring planning. Other restrictions include inter alia restrictions on building prohibitions.

LUBA distinguished areas requiring planning as areas where the use requires special measures, such as road, water or sewer construction or arranging other areas (LUBA § 16.1). Provisions concerning areas requiring planning also apply to construction where the environmental impact is so substantial as to require more comprehensive consideration than the normal permit procedure (LUBA § 16.2). In this case the area requiring planning is based on law. In addition the municipality may set in the local master plan or in the building ordinance, that certain areas require planning, as section 16.3 of LUBA provides:

“In a legally binding local master plan or building ordinance, local authorities may also designate areas where, due to their location, community development requiring planning may be expected, or where land use planning is warranted by particular environmental values or hazards, as areas requiring planning. An order in a local master plan or a building ordinance designating an area as requiring planning may be in force for a maximum of ten years at a time.”

There are also special (additional to the normal procedure) preconditions for granting building permits in areas where planning is required. A building permit may be granted in an area requiring planning that is not covered by a local detailed plan, provided that construction: 1) does not hinder planning or other organization of land use; 2) does not lead to harmful community development; and 3) is appropriate with regard to the landscape and does not hinder preservation of the values of the natural or cultural environment, nor provision to meet recreational needs. Notwithstanding the above provisions an outbuilding may be built in connection with an existing dwelling or farm. When a building permit is considered for an area requiring planning the provisions on deviation procedures shall be observed with regard to hearing interested parties and authorities. The local authority must inform the regional environmental centre of the permit decisions. (LUBA § 137)

These are general rules, which give possibilities of interpretation as to what areas can be included within the scope of areas requiring planning. However, we could argue that this provision of law confirms that in urban areas development without a plan is a rare exception. Urban development usually involves needs that require special measures, such as road, water main or sewer.

There are also building restrictions in Finland, which the municipality can impose on land. A building restriction is in force in areas designated by the regional plan as recreation or protection areas or areas for transportation or technical service networks. The area covered by building restrictions may be increased or decreased by a special order in the plan. Where a building restriction is in force, a building permit may not be granted if it hinders implementation of the regional plan. Where a building restriction is in force, a building permit may not be granted if it hinders implementation of the regional plan. The permit shall be granted, however, if its denial on the basis of the regional plan would cause substantial harm to the applicant, and the local authority or, when the area should be considered reserved for its needs, some other public entity does not expropriate the area or does not provide reasonable compensation for the said harm (*conditional building restriction*). (LUBA § 33)

In addition when the drafting or amendment of a local master plan in Finland has been initiated, the local authority may impose a building prohibition in the area and a restriction on action. The maximum term of building prohibitions and restrictions on action is five years. While planning remains incomplete, the local authority may extend the term by a maximum of five years and the regional environmental centre, under application from the local authority and for a specific reason, for a further maximum of five years. (LUBA § 38)

When an area or building requires protection due to its landscape, natural values, built environment, cultural and historical values or other special environmental values, the necessary regulations for this purpose may be issued in the local master plan (*protection regulations*). These include *restrictions on building and action*. A building permit may not be

granted if it hinders implementation of the local master plan. The permit shall be granted if, however, its denial on the basis of the local master plan would cause substantial harm to the applicant, and the local authority or, when the area should be considered reserved for its needs, some other public entity does not expropriate the area or does not provide reasonable compensation for the said harm (*conditional building restriction*). (LUBA §§ 41, 43)

In Finland there are also possibilities to impose prohibitions during drafting or amendment of the local detailed plan. Section 53 of LUBA provides:

“The local authority may impose a building prohibition in an area concerning which a local detailed plan is being drafted or amended. Alteration of the landscape in areas where building is prohibited is subject to permit as laid down in section 128 (restriction on action).”

A building prohibition is in force for a maximum period of two years. While the plan remains incomplete, the local authority may extend the term by a maximum of two years at a time. However, a building prohibition imposed by the local authority for the purpose of extending the area of the plan may not exceed eight years in duration.

A building prohibition is also in force in areas covered by an approved local master plan or an approved amendment thereof, until the approval decision has taken legal effect.”

In Finland, in the Real Estate Formation Act (554/1995, hereinafter REFA) there are further regulations, which aim to prevent activities impeding planning or plan implementation. However, their significance and necessity are often questioned (Viitanen *et al.* 2003, p. 59). These include the provision that forbids real property formation if the new real properties are not according to the effective plan or complicates the further planning. Without formation of a real property unit, a building permit cannot in some cases be obtained.⁹⁵

In Poland planning law does not give so many instruments for an implementation of land policy or protection of public interests as in Finland. In Poland an area can be reserved as an area for which a local plan must be drawn up. Another instrument allows suspending the decision on land development conditions.

The framework study in Poland defines in particular areas, for which it is mandatory to draw up a local plan on the basis of separate regulations, including areas requiring consolidation and subdivision of land, as well as areas of location of retail units of over 2000 sqm. and public areas (art.10.2 LUDPA). The obligation to draw up a local plan in these cases is formed after a period of 3 months from the date of the establishment of this obligation (art.10.2.3 LUDPA).

If an application for a decision on land development conditions concern an area, for which there is an obligation to draw up a local plan, the proceedings regarding the determination of the decision on land development conditions is suspended until the local plan is adopted (art.62.2 LUDPA).

⁹⁵ Only in a detailed plan area with a binding plot division

In Poland, the proceedings regarding the determination of the decision on land development conditions may be suspended for up to 12 months from the date an application for determining the development conditions is filed. The municipal administrator, mayor or city president will re-open the proceedings and issue the decision on land development conditions if: 1. the municipal council has not adopted a resolution on starting to draft a local plan within two months of the proceedings being suspended, or 2. during the suspension period, no local plan nor any amendment thereto was adopted. (Art.62.1 LUDPA)

In an agreement concerning a perpetual usufruct the manner and time limit for development of a real estate, including the date of its construction, can be defined (AREM, art.29, art.62). If the deadline for the development of the real estate was not observed, the competent authority may set a new deadline for the development or decide about an additional annual fee, or ask for termination of the contract of perpetual usufruct (AREM, art.63).

In addition there are in Finland special requirements concerning planning in shore areas. Section 72 of LUBA states that the buildings may not be constructed in shore zones (in the shore area of the sea or of a body of water) without a local detailed plan or a legally binding local master plan which contains special provisions concerning building permits. These provisions also apply to shore areas where planning of building and other use to arrange for holiday homes which are mainly shore-based is necessary because of anticipated building development in the area. However, the provisions do not apply to the following: 1) building required by agriculture and forestry or fishery; 2) building to serve the needs of national defence or frontier control; 3) building required by navigation; 4) building of an outbuilding within the cartilage of an existing residential building, or 5) repair of or limited extension of an existing residential building. (LUBA § 72)⁹⁶

Concerning large retail units in Finland section 58 of LUBA states:

“A large retail unit may not be located outside the area designated in the regional plan or the local master plan for central functions, unless the area is specifically designated for such a purpose in the local detailed plan.”

In Poland the framework study defines in particular (art. 10.2 LUPDA) areas, for which it is mandatory to draw up a local plan on the basis of separate regulations, including areas requiring consolidation and subdivision of land, as well as areas of location of retail units of over 2000 sqm. and public areas.

Furthermore the use of lease or sale of land as an instrument of land policy can be discussed. Hong & Bourassa (2003) argue that lease conditions in Finland are not used to control land use. This is controlled by the local detailed plan. The Leasehold Act (258/1966) does not

⁹⁶ After having heard the regional environmental centre, a local authority may designate areas in the building ordinance where the restriction laid down in paragraph 72.1 is not in force because no building activity is anticipated in the area due to its location and the area has no special natural or landscape values or is not needed for recreational use. The maximum term of such a building-ordinance regulation is six years at a time, though not continuing if the conditions from which the regulation derives change and the preconditions for the regulation no longer exist. (LUBA § 72)

contain restrictions on the timing of development; however, in practice municipalities incorporate special conditions in leases that require lessees to complete construction within a specified period (Mierzejewska & Viitanen 2005).

In the Polish system, land lease conditions are used to control land use and development. In the agreement concerning a perpetual usufruct the manner and time limit for the development of real estate, including the date of its construction can be defined (AREM, art.29, art.62). If the deadline for the development of the real estate was not observed, the competent authorities may set a new deadline for the development or establish an additional annual fee, or ask for the termination of a contract of perpetual usufruct (AREM, art.63).

Perpetual usufruct is a special entitlement to land popular in Poland. The nature of this right is similar as in the case of ownership right although it is established for a limited period of time. Perpetual usufruct is a right established only on land owned by the State or self-governing institutions and represents a long-term interest in land. The State Treasury or local authority remains the landowner while perpetual usufructors (the holder of perpetual use) may use the land like owners with limitations only in time and as specified under the perpetual usufruct agreement. This right can be established on land in urban areas and settlements (within the territories of cities), and/or in areas designated for future development (outside cities but covered by local development plans). It is concluded by an act or contract between the State Treasury or a local authority and a natural person or a legal entity in the form of a notarial deed. The agreement describes the use of land, the period of agreement (a minimum period of 40 years and a maximum period of 99 years, but usually for 99 years, with an option to extend the term for an additional period of up to 99 years), investment conditions and development work, the usage of buildings and structures, and commission arrangements for the perpetual user for building and structures existing on the land at the date of expiry of the agreement. Thus this agreement determines the date and the manner of land development. The further extensions of the contract are also possible. If the perpetual usufructor uses the property in a manner inconsistent with the use designated in the contract, in particular if he has not developed the land within the time limit specified in the contract, the perpetual usufruct can expire before the term fixed in the contract. The conclusion of a contract concerning perpetual usufruct is the subject of an obligatory public tender organised by the owner, the State or by a self-governing institution. (CC art.234-236, AREM, Chapter 3)⁹⁷

Every municipality in Finland must have a building ordinance. However, the building ordinance regulations are not applied in matters where a legally binding local master plan, local detailed plan or the Finnish Building Code provides otherwise (LUBA §§ 2, 13, 14). The building ordinance may contain different regulations for different areas in the municipality. These regulations are used for organized and appropriate building, taking cultural, ecological and scenic values into account, and for creating and maintaining a good living environment. The building ordinance regulations may concern construction sites, the size and location of

⁹⁷ For land developers it is important that in cases of perpetual usufructs buildings (or other structures) erected on the land under perpetual usufruct remains the property of the perpetual user. The perpetual usufruct is available only in cases of land; the property inherently tied to such land (buildings, structures, and machinery) existing on the land before agreement cannot be a subject of perpetual usufruct and has to be sold (subject of the right of ownership) (AREM art. 3).

buildings, building's suitability for its surroundings, methods of construction, planting, fences and other constructions, management of the built environment, organization of water supply and drainage, definition of areas requiring planning, and other corresponding matters of local importance pertaining to building. (LUBA §14)

In Poland only the local plan can contain legally binding provisions concerning spatial development principles in the municipality. The system to control unwanted aspects of real estate development processes or direct the land policy in the municipality is very weak in Poland in comparison to Finland.

8.4 Summary of delineation and allocation of rights

The table below contrasts the balance between flexibility and certainty in development control in both countries concerned in this research.

Table 15. The balance between flexibility and certainty in the development control

<i>Finland</i>	<i>Poland</i>
<i>The hierarchy of planning</i>	
Hierarchical system	Quasi-hierarchical system
All planning documents at the local level can be legally binding	No legally binding provisions of the framework study, the system of decisions on conditions of site development instead of planning
<i>The right to develop</i>	
Development rights are limited by municipal planning monopoly,	Every landowner has a right to develop, according to plan or based on decision
In urban areas the development without plan is a rare exception	Building in areas with no land-use plan becomes the norm
<i>Availability of instruments to control development</i>	
The local master plan may be legally binding or not	The framework study has no legal character and cannot fully direct the land policies
Area requiring planning (areas requiring planning as area the use of which involves needs that require special measures, such as road, water main or sewer construction or arranging other areas)	The area can be marked as an area for which a local plan must be drawn up or another instrument allow for suspending issuing of the decision on land development conditions
Restrictions on building prohibition, every municipality must also have a building ordinance	Only local plan has legally binding provision for land development

It can be argued that the distribution of rights given by the property rights regime in relation to this explanatory variable, directs the methods of land development in Poland towards a

third line of planning, whereas in Finland it directs the methods towards an active participation in land development processes. In Poland a municipality has not got sufficient enforcement possibilities for implementing the strategic decisions. The number of enacted local plans is also unsatisfactory and the municipal planning activities remain at a low level. Polish system in a sense, encourages private landowners to act in the land market by giving them the right to develop and limit the enforcement possibilities in relation to planning and development of the local authorities.

In the case of this explanatory variable, it is easy to establish the link to efficiency problems, like haphazard development in the cities. The availability of instruments to control undesired development is quite low in Poland in comparison to Finland. The right to make an independent decision concerning land development issues (planning monopoly - the right to decide how land will be developed and the right to decide by whom land will be developed) as well as the right to develop versus ownership rights and the power to protect the third parties interests are potential areas to incorporate changes in the system in Poland.

Chapter Nine

THE ECONOMIC RIGHT IN LAND DEVELOPMENT PROCESS

This chapter focuses on the economic right in land development process. Economic right in land development process concerns the distribution of costs and benefits from the development activity. Based on the comparative research the following issues will be discussed: planning costs, the costs of the provision of infrastructure, transfer to the municipality street and public road areas, the compensation to landowners for land use restrictions, and the right to development gain.

9.1 The contribution to the development costs

9.1.1 Planning costs

First the cost of drawing up local plans will be discussed. In Finland in general the costs of local detailed plans are covered by the municipality. However, there is exception from this rule according to law in force. When the local detailed plan or an amendment to it is mainly required by private interests and drawn up on the initiative of the landowner or other titleholder, the local authority is entitled to charge the costs incurred in drawing up and processing the plan to the landowner or titleholder concerned (LUBA § 59).

In cases regarding shore areas, when a local master plan is drawn up for shore areas for the principal purpose of arranging holiday homes, no more than half of the costs of drawing up the plan can be charged to the landowners in relation to the benefit they gain from the plan. The local authority approves the basis for the charge, which is collected in planed area, and the manner and date of payment. (LUBA § 76)

In Poland the cost to draw up the local plan is covered in general from the budget of the municipality (art. 21.1 LUPDA). Only the cost of drawing up or changing the local plan resulting from the allocation of public investment of national, regional or county importance is covered respectively by the state budget, the budget of the region or county budget (art. 21.2-3 LUPDA). In cases of public investment projects, the cost to draw up the local plan is covered by investors pursuing the investment, in part, in which it is a direct consequence of the intention to implement this investment (art. 21.4 LUPDA). Therefore private contributions to the costs of plans being elaborated on are not legal.

9.1.2 The cost of the provision of infrastructure

In Finland the system of ‘development compensations’ has been developed. The term development compensation is a translation to English used in Finland⁹⁸. However, it could be noticed that the word compensation is perhaps not used in an adequate way. Compensation means usually a payment for damage or loss. In this context the term ‘betterment levy’ would

⁹⁸ It is an unofficial translation of the Act, however available e.g. at the webpage of the Ministry of Environment.

be more appropriate. However, having this in mind, I will follow the term of development compensation used in Finland.

In Finland, planning charges on the increment in land value due to the approval of the local detailed plan was not mentioned in the planning legislation before 2003. But it was a normal practice that municipalities collected these kinds of payments on the basis of civil law agreements. According to the articles of LUBA added in 2003, a landowner who gains a remarkable profit of a detailed plan may be obligated to pay compensation for the infrastructure to the municipality. Section 91a of LUBA concerning a landowners' duty to share in the costs of community building provides:

“A landowner in an area for which a local detailed plan is to be drawn up, who stands to gain substantial benefit from the plan is obliged to share in the costs incurred by the local authority from a community building as laid down below. Agreement should be reached with the landowner on sharing in the costs. Landowners shall be treated equally with regard to fulfilling the obligation.”

Thus the landowner who gains significant benefit from a plan, is obliged to take part in paying the infrastructural cost (the costs of community building) that occur in the municipality. First, this participation should be attempted to be realised through an agreement. Therefore the municipality can make agreements concerning planning and plan implementation (land use agreement). (LUBA § 91c)

If no agreement has been reached with the landowner on his or her participation to the costs of infrastructure, the municipality can oblige the landowner to pay a part of the costs of infrastructure (which serves the said plan area), which is in proportion to the value increase of the plot caused by allocated building rights in the local detailed plan, an increase of building rights in the local detailed plan or a change in the purpose of use. This is called in LUBA development compensation. (LUBA § 91c)

Section 91 c of LUBA concerning development compensation provides:

“When agreement is not reached with landowners concerning their sharing in the costs of community building, the local authority may collect from the landowners a share of the estimated costs of community building that contribute to the development of the plan area relative to the increase in plot value brought about by the building rights, increase in building rights or change of permissible use based on the local detailed plan (development compensation). (...)

The value of street areas transferred without compensation under section 104 and the street area compensation collected from landowners under section 105 are deducted from the development compensation.

When the building rights assigned by the local detailed plan concern only housing and the amount of building rights or increase in building rights do not exceed 500 m² in gross floor area, the landowner concerned cannot be required to pay development compensation. Other landowners may be required to pay development compensation if the local detailed plan brings substantial benefit as referred to in section 91 a. Local

authorities may establish a higher minimum to apply in their municipality or in a particular plan area.”

Therefore development compensation cannot be allocated to a landowner, whose areas in the local detailed plan are only indicated to be used for residential building and the building right or its increase is less than 500 floor sq m. (LUBA § 91c). The maximum 60 % of the plot value increase caused by the local detailed plan can be collected as development compensation. However, the municipal council can also decide upon a lower percentage for the municipality or planed area. The municipality may also decide on not imposing development compensation. The decision must be made without delay after a local detailed plan has been approved. The decision must include grounds for imposing development compensation (LUBA § 91f).

When assessing the increase in the value of the plot, the provisions concerning grounds for compensation in the Act on Expropriation of Immovable Property and Special Rights (603/1977, hereinafter the Expropriation Act) are followed, where applicable. The value of the street area which is given without compensation (LUBA § 104), as well as the compensation for street area paid by the landowner (LUBA § 105) are deducted from the development compensation. (LUBA § 91c)

The discussed costs incurred by the local authority from community building include:

- the acquisition, planning and construction costs of streets, parks and other public areas both in the plan area and outside it that substantially serve the plan area
- the costs incurred from acquiring land to build public buildings that substantially serve the plan area, relative to the benefit they bring to the plan area
- the costs incurred by local authorities from soil improvement and from necessary noise abatement in the planed area and the costs incurred from planning that have not been collected (LUBA § 91d)

The costs referred to above shall include both the estimated costs of implementing the plan and the costs incurred by the local authority from measures taken in advance to implement the plan. Costs must be reasonable regarding the character of the area and the circumstances in it. When the costs of measures have been taken into account in development compensation the local authority must endeavour to carry out these measures within 10 years after the decision to collect the compensation has become legally valid. (LUBA § 91d)

The above-mentioned mechanisms concern the local detailed plan. In cases regarding the local master plan and the regional plan there are no development charges mentioned in the legislation.

In Poland the system of ‘planning charges’ – a special one-time fee and betterment charges has been developed. If, in connection with the enactment of a local plan or its amendment, the value of the property has increased and the owner or perpetual user sells the property, the municipal administrator gets a one-time fee as set out in the local plan. This one-time fee is set out in relation to the percentage increase in the value of the property. The fee cannot be higher than a 30% increase in the value of the property. (art. 36.4 LUPDA)

The fee is charged in cases when the owner or perpetual usufructuary sells the real estate within 5 years from the date when the local plan or its revision came into force (art. 37.4 LUPDA). The mayor may collect this fee (art. 36.4 LUPDA).

Landowners in Poland participate in the costs of construction of technical infrastructure facilities by paying betterment charges to the municipality (AREM art. 144). This principle is adopted for real estate disregarding its type and location, as long as the construction of technical infrastructure facilities is co-financed by the Treasury, local self-government entities, European Union funds or non-returnable foreign funds, excluding lands designated in the local plan for farm and forestry use (AREM art. 143).

The construction of technical infrastructure is understood to include the building of roads and undergrounds, on ground or above ground pipes or infrastructural equipment for water, sewage, heating, electricity, gas and telecommunications (AREM art. 143.2).

The mayor may, by decision, establish betterment charges after creating conditions for the connection of property to individual devices of the technical infrastructure or conditions for the use of built roads. The decision concerning betterment charges may be issued in the period of 3 years beginning from when the conditions for connecting the property to technical infrastructure was first set (AREM art. 145).

The betterment charges depend on the increase in land value caused by the construction of technical infrastructure facilities (a real estate appraisal is required) (AREM art. 146). The value of betterment charges shall not be higher than 50 percent of the value of the difference between the value of the land before and after the technical infrastructure facilities are built. The rate of the infrastructure development compensation is set by the municipal council through a resolution, but the value of the compensation in particular cases is determined by the municipal executive body. (AREM art. 146)

The betterment charges may be, at the request of the owner of the property, spread over annual instalments payable over a period of 10 years. Conditions spread across the instalments shall be determined in the decision concerning the betterment charges. (AREM art. 147)

The betterment charges may be also implemented in the event of an increase in property values due to its division and in the event of an increase in property values as a result of the consolidation and subdivision. (AREM art. 98a)

If, as a result of the division of property made at the request of the owner or perpetual user, the value of the property will increase, the mayor may establish betterment charges by decision. The amount of percentage of betterment charges is set up by resolution of the municipal council. The value of betterment charges shall not be higher than 30 percent of the value in the difference between the value of the land before and after the division. The decision concerning betterment charges may be issued in a period of 3 years starting from the date when the decision concerning division of property becomes final. (AREM art. 98a)

Persons, who have received a new property as a result of consolidation and subdivision processes, are required to pay to the municipality the betterment charges in the amount of up to 50% of the increase in the value of these properties, in relation to the value property owned

before. The amount of the percentage is determined by the decision of the municipal council. (AREM art. 107)

In Poland, even though municipalities have insufficient finances, they make little use of the instruments that have been created especially for improving this situation. In 2002, the Supreme Chamber of Control (SCC) carried out a control to evaluate the processes of determining and collecting betterment charges in the years 1999-2002 (up to the end of the third quarter of 2002)⁹⁹. The control revealed that municipalities were reluctant to levy and collect betterment charges, also in cases where they financed costly technical infrastructure facilities. The controlled municipalities completed a total of 1 256 investments related to technical infrastructure facilities for a total of PLN 483 997 000, with their own resources amounting to PLN 412 039 000 (85.1%)¹⁰⁰. (NIK 2003)

Control results revealed that in 16 municipalities under scrutiny (50%), municipal councils did not pass any resolutions required by law concerning levying betterment charges. Real estate appraisal was not done either, which practically made it impossible even to determine whether betterment charges procedures should be started or not. There were also problems with the collection of the planning charges that some of the municipalities did levy. (NIK 2003)

According to the SCC, due to the irregularities and negligence in the collection of levied betterment charges and abstaining from levying betterment charges (despite the fact that the value of real estate had increased), the revenues of the controlled municipalities had been diminished by at least PLN 2 905 300 (of which 329 000 was recovered as a result of the SCC's post-control motions). (NIK 2003)

According to the SCC's data for the years 1999-2002, in 252 municipalities out of 276 under consideration, significant changes were made to local spatial development plans. However, only 60 municipalities (approx. 24%) collected a one-off betterment charge fee from perpetual usufructuaries for an increase in the value of their property due to the municipality's planning activities. Results from the control carried out in 2007 largely confirmed the results of previous controls in this respect¹⁰¹. Municipalities still did not make substantial use of their statutory rights to levy betterment charges fees or execute their duty to collect planning charges. As a result, they deprived themselves of their budgetary revenues, which were evaluated at over PLN 3.6 million. (NIK 2007)

It happens on the other hand in practice that a developer pays two times. First developers participate voluntarily in the part of the cost of construction of technical infrastructure in order to facilitate the process and then the developer pays again the betterment charges. It could also happen in practice that a developer is building the technical infrastructure and the municipality releases him from betterment charges.

⁹⁹ A control was carried out in 32 territorial self-government units.

¹⁰⁰ The remaining capital used to finance these investments came from appropriated funds and loans amounting to PLN 51 374 (10.6%) as well as voluntary contributions from the owners or perpetual usufructuaries of real estates located within the range of an investment amounting to PLN 20 374 (4.3%).

¹⁰¹ 32 municipalities were investigated.

Therefore in Poland municipalities have difficulties to ask developers to participate in the cost of building areas for unprofitable uses (parks, social housing) connected with development of an area.

9.1.3 Transfer to the municipality street and public road areas

Transfer to the municipality street and public road areas should be discussed here as consequences of an adoption of plans. In Finland when the local detailed plan comes into force, the road area of an existing public road¹⁰² included in the plan area is transferred to the municipality's ownership without compensation (LUBA § 93).

In addition, when a local detailed plan is approved for an area for the first time, the local authority in Finland gains possession¹⁰³ of any street area not previously in its possession (LUBA § 94). In the situation when the local detailed plan is approved for an area for the first time, the landowner is obligated to transfer to the municipality the area needed for streets without compensation (LUBA §83). However, there is limitation to this rule. The area can be transferred without compensation if the area does not exceed 20% of the total land owned by the landowner in the local detailed plan area, or is not larger than the building volume permitted for the land remaining in his/her ownership¹⁰⁴. Land designated in the local detailed plan as agricultural, water and forestry areas are not included into calculation of the total land. In other cases, then the coming into force of the local detailed plan for the first time, the municipality must pay compensation for the street area to the landowner determined according to the provisions of the Expropriation Act. (LUBA §104)

If a landowner does not have to transfer a street area without receiving compensation as referred to above or has to transfer a significantly smaller area, the local authority may set reasonable compensation to be paid by the landowner (compensation for a street area). (LUBA §105)

In Poland, transfer to the municipalities the area needed for streets is defined by the legislation in the following way. After the local plan is adopted the real estates must be divided according to the new plan in order to start the construction process. According to the Act on Real Estate Management of 21 August 1997 (AREM), after approval by the municipality of the division of the real estate, the landowner must transfer to the local

¹⁰² Nowadays according to the Highway Act 503/2005 a road assigned for general traffic and maintained by the State is defined as a highway.

¹⁰³ The local authority gains possession of an area when construction commences or it is needed for some other use and partition to separate the area that has been initiated, or when the local authority has paid compensation for the area if necessary. If a building with greater than minor value, or a valuable structure or piece of equipment is located in the area, or the area is necessary for their use, the local authority may not take possession of the land before an agreement is reached on compensation or an expropriation procedure has been initiated. Once the expropriation procedure has been initiated, the local authority may take possession of land which will become part of a street area when the local detailed plan is amended. (LUBA § 95)

¹⁰⁴ Notwithstanding this provision, the local authority is obliged to pay the landowner compensation for the street area if, taking into account the total impact of the transfer and the plan on the said landowner, transferred without compensation is, exceptionally, manifestly unreasonable. (LUBA §104.3)

authority's ownership those parcels that have been separated for streets, and in return should receive compensation in cash or in the form of land (art. 131, art. 98 AREM). The problem is that most municipalities do not have funds to pay the compensation.

Article 98.1 of AREM provides that plots of land designated as public roads (municipal, county, regional, or national) – within the real estate divided at the request of the owner, must be transferred, by law, accordingly to the ownership of the municipality, county, region or the State Treasury on the date on which the decision approving the division has become final. Article 98.3 of AREM provides that for plots of land referred to above, the landowner should receive compensation in the amount as agreed between the owner and the competent authority. If there is no agreement, at the request of the owner the compensation shall be determined and paid according to the rules and procedures applicable as in the cases of expropriation of real estate.

9.1.4 Compensation to landowners for land use restrictions

The next issue concerns the compensation paid to landowners for land use restrictions included in the local plans. In Finland, if the implementation of the local detailed plan or the local master plan causes the landowner special harm or losses, the municipality (or the State, if the area is designated for the State) provides the compensation, provided they are not considered to be insignificant. (LUBA §§ 101, 106)

More precisely Section 101 of LUBA states that when the local detailed plan or, the local master plan, designates land for a purpose other than private construction and the landowner cannot therefore use the area in a manner generating reasonable return, the local authority or, if the area is intended or designated in the plan for State needs, the State is then required to expropriate the area or pay compensation for the harm.

Section 102 of LUBA states that the duty of the local authority or the State to expropriate or pay compensation as laid down in section 101 takes effect only after the landowner's application for an exemption to the restriction has been denied and the decision has gained legal force. The local authority and the State are released from their duty to expropriate or pay compensation when, due to an amendment of the local master plan or the local detailed plan, the area can be used for private purposes in a manner generating reasonable return and the matter concerning the duty to expropriate or pay compensation has not been resolved or gained legal force.

The content of the local detailed plan can be subject of compensation if a plan substantially weakens the quality of anyone's living environment in a manner that is not justified by the plan's purpose and that the plan imposes restrictions on or causes harm to landowners or titleholders that could be avoided without disregarding the objectives or requirements of the plan (LUBA §§ 28, 39). These apply for example according to Nuuja & Viitanen (2006) to the situations, where the traffic connections to a plot is cut off.

In Poland the compensation for decrease in land value and other restrictions included in the local plan are defined in the following way. If in connection with the enactment of a local plan or its amendment, the use of real estate or parts thereof in the current manner or in line

with the intended purpose has become impossible or severely restricted the owner or perpetual user may require from the municipality:

- a. compensation for actual injury suffered, or
- b. purchase of the real estate or its parts (art. 36.1 LUPDA)

The municipality may also offer other real estate in exchange. When the owner accepts other real estate instead he/she is not entitled anymore to compensation (art. 36.2 LUPDA). If, in connection to the enactment of a local plan or its amendment, the value of the property has deteriorated, and the owner or perpetual user sells the property and had not availed themselves of the rights to compensation before, he/she may claim compensation from the municipality which equals reduction in property values (art. 36.3 LUPDA).

Therefore the main difference is when the compensation is paid. In Finland compensation is paid when the landowner cannot use the area in a manner generating reasonable return. In Poland compensation is paid in connection to the adoption of a local plan or its amendment.

9.2 The right to development gain

The amount of development gain from the process of land development is influenced by the approach to capture so called unearned increment. In Finland municipalities very often persuade an active land policy. For example the land policy of the city of Oulu is based mainly on the following principles:

1. *“The city draws up detailed town plans mainly for land owned by the city*
2. *The city arranges land acquisition before zoning and sets the prices based on expected value. Because the city is responsible for all municipal engineering services the increase of the land value, which is caused by zoning, becomes for the city.*
3. *The city is ready to use all possible means in land acquisition: usually voluntary contracts but when needed, pre-emption and compulsory purchase*
4. *The city decides which areas are covered by town plans*
5. *In cases of town plans for private land, the city signs the land development agreement with landowner”. (unofficial translation available in the Technical Centre of the city of Oulu, Mierzejewska & Viitanen, 2005)*

By acquiring the land before planning, the increase in land value belongs to the city. Also expropriation principles in Finland allow capturing the increase of land value due to planning by the municipality.

Expropriation in Finland is based on parliamentary legislation, which is the Act on Expropriation of Immovable Property and Special Rights (1977/603, the Expropriation Act) or is grounded in other parliamentary legislation. Therefore expropriation can be based on the Expropriation Act (lex generalis) or on other enactments e.g., LUBA or REFA (lex specialis).

The object of expropriation, the content of the “public interest” (public need), the concept of “full compensation” and all procedure, which must be followed are basically provided by the Expropriation Act.

“Public need” is the general expropriation basis (Expropriation Act § 4). There is not an exhaustive list on the appropriate purposes for expropriation. Korhonen (1997, p.16) argues that “public interest” generally covers all the needs of society, which allows the society to work in a satisfactory way. Korhonen continues that in the *travaux préparatoires* it states that “the content of the expression “public interest” shall be defined case by case in accordance with the legal practice and the changing conditions, and no general definition can thus be given.” Therefore the interpretations of the content of the expression of “public interest” can vary depending on the time, the operation and the region and it is not an unchanging legal concept. However, as Korhonen (1997) stated in the jurisprudence this term has been defined rather consistently. Talas (cited in Korhonen, 1997, p.16) argues that the public interest can be seen as an opposite to private interest and states that the purpose to be implemented should benefit an undefined circle of people, not only a small special group of people. In addition the same author stated that the purpose to be implemented should be permanent but not necessarily essential. What is interesting in the Finnish case, although the expropriation is only allowed for public purpose and the expropriator in most cases is the state or the local authority, also a representative of the private party may be an expropriator, if the existence of a common need that requires expropriation can be proven (see Nuuja *et al.* 2007). In addition to “public interest” the expropriation is only allowed if there is no other solution to solve the problem or if the harm caused to the private interest is bigger than the profit to the public need.

The object of expropriation may be either the immovable property or special rights. Immovable property means a title or similar right to immovable property or to any other land or water area and to the buildings or structures in these areas. Special rights means a right to use (usufruct), an easement, a right of severance or other comparable right to immovable property or to some other land or water area as well as to buildings and other such construction which are owned by someone else (Expropriation Act § 2). The procedure of expropriation according to the Expropriation Act consists of two phases: a phase of obtaining the administrative permit for expropriation and a phase in which compensation is determined. The main permit authority in the case of expropriation based on the Expropriation Act is the Ministry of Environment. If the permit is applied for an operation listed in the Act, e.g. for power lines, natural gas pipes, etc., and it is not opposed by the parties, the permit decision is made by the District Survey Office, i.e. the Cadastral Authority. The same applies also if the compulsory purchase is of smaller importance. (Expropriation Act § 5)

The owner of the property and the holder of a usufruct have a right to be heard before the permit can be granted. They might have given a written statement where they accept the compulsory purchase beforehand, but if not, they have the right to give a statement on the application within a time frame (30 to 60 days) set by the authority. (Expropriation Act § 8)

If the right to expropriate is directly granted in law (e.g. LUBA) or included in some environmental permit or some confirmed scheme, no separate permit is needed (Expropriation Act § 5). Therefore there is no need to have a spatial plan in order to start an expropriation procedure.

In Finland compensation for expropriation must be full, i.e. market value. However, the cutting of the unearned increment is a very important practice. Recapture of unearned increment in expropriation has been applied in theory since 1978. In practice according to

Viitanen (2009) it has been used only a few times in the last 30 years (Viitanen, 2009). However, existence of this rule gives the municipality a different position when acquiring land in voluntary means. This rule was known as the cutting of development value and meant that compensation must be determined according to the value, which the land in question had seven years before the beginning of the expropriation procedure. Section 31 of the Expropriation Act states:

“If the enterprise for which the expropriation is carried out significantly raised or lowered the value of the expropriated property, compensation shall be determined so as to reflect the value that the property would have without side effect.

When immovable property or a permanent special right is acquired by the State, a local authority or a municipal federation for urban development in an area for which the local council has decided to have a local detailed plan drawn up or an existing local detailed plan amended, any rise in the value of the land after the decision to draw up or amend the plan shall be ignored. The party receiving the compensation shall be credited for that part of the rise in value that corresponds to the rise in the general price level or that is otherwise caused by reasons other than the planning for the purpose of which the expropriation is carried out.

In determining compensation on the basis of paragraph 2, any rise in the value of the land shall not, however, be ignored for more than seven years, calculated from the day preceding the date on which the expropriation process was instituted”

In Poland municipalities in general are passive in acquiring land before planning. Therefore they cannot capture the increase of land value due to planning by pursuing an active land policy. The basic principles of real estate expropriation are laid down in the Constitution of the Republic of Poland, while the detailed procedures laid down in The Act on Real Estate Management of 21 August 1997, in force from January 1st 1998 (AREM). Therefore expropriation is regulated separately from planning and building law. Real estate expropriation means deprivation of the property rights or other rights regarding a real estate (perpetual usufruct, limited property rights) by an administrative decision, for just compensation.

Under art. 112 AREM expropriation procedures can be applied only to the real estate, which is located (with exceptions provided under art. 125 and art. 126 AREM) in the areas covered by the local plans, which is designated in the plan for public purposes, or for which the decision defining the localization of public investment projects has been issued. The exceptions from this general rule have been provided for:

- a) activities related to searching for, identifying and excavating minerals which are the property of the State (up to 12 months);
- b) temporary taking over the real estate in the case of emergency situation, when considerable damage needs to be prevented from occurring (up to 6 months).

Expropriation of real estate can be used, if the public interests cannot be achieved in any other way than by deprivation or restriction of property rights, and these rights cannot be acquired by agreement. Real estate may be expropriated only for the State Treasury or to the self-government units (art. 113 AREM).

The expropriating public body must first negotiate with the real estate owner, and propose an agreement (art. 114 AREM). Therefore expropriation has to be preceded by negotiations between a public entity and the owner of the real estate which is indispensable for achieving a specific public purpose. If the real estate, which is necessary for a public purpose, cannot be acquired by purchase, the expropriation procedure is instituted.

The following stages of the real estate expropriation procedure have been identified by Żróbek & Żróbek (2008, p.66):

1. *“establishing the necessity to achieve a public purpose on a real estate;*
2. *conducting negotiations with a view to acquiring a real estate by means of concluding a contract (within 2 months);*
3. *issuing an expropriation decision – instituting the expropriation proceedings – administrative trial;*
4. *establishing the compensation – decision to be taken by the head of the county;*
5. *appeal, if any, against the decision to grant compensation and its amount;*
6. *taking the final decision and payment of the compensation”*

Expropriation decisions are issued by the head of a county, within the scope of performing government administration tasks, and appeals are considered by the Marshal of the Region. The transfer of a substantial right to the State Treasury or to units of territorial self-government becomes effective on the day the expropriation decision becomes final (art. 118a AREM).

The expropriation law is accompanied by provisions for the payment of prompt and adequate compensation. Payment of compensation for expropriated real estate in Poland is guaranteed by the Constitution of the Republic of Poland. The term ‘full compensation’ is not applied in the Polish Constitution. Instead the adjective ‘just’ is used. Article 21 of this Constitution states that expropriation is allowed solely for public purposes and for just compensation. Just (equitable) compensation means compensation corresponding to the market value of the property. It means in practice the compensation mechanism refers to the fair market value of the property. There is only compensation for value of taken land. There is no compensation in relation to damages associated with expropriation, such as loss of future profits (Gdesz, 2007).

Therefore compensation shall be based on the market value of real estate affected in the day of the decision of expropriation (art. 134 AREM). Where the market value cannot be ascertained, compensation may be determined using the cost approach. As compensation the real estate owner may accept also other real estate offered by the expropriating public body. Compensation must correspond to the current use of the real estate or the use designated in the local spatial development plan, if this use, consistent with the purpose of expropriation, will result in increase of the value of the real estate. The acquiring authority can receive the land when the decision concerning expropriation is final. It means that in case the landowner appeals the decision to the higher instance, land cannot be transferred. This situation has resulted in the postponing of many public projects.

The main difference in comparison to Finland is vested in the fact that in Poland municipalities are not pursuing active land policy. In Finland by active land policy

municipalities acquire land at the early stage of development. In this way the increase in land value in the development process comes to the municipality.

In Poland, expropriation is allowed only based on the local plan and compensation is to be paid to original landowners including the increase in land value due to planning. In Finland cutting an increase in land value due to planning and development is important practice. So-called strategic land acquisition before planning is an important land tool and practice. In addition expropriation in Finland is allowed without a spatial plan.

9.3 Summary of delineation and allocation of rights

The table below contrasts the differences in the economic rights in land development process in the two countries concerned in the research.

Table 16. How property rights distribution serves the interests of landowners versus municipalities in Poland and in Finland. Comparison of selected instruments

	Finland	Poland
The contribution to the development costs		
The cost of drawing up a local detailed plan	In general covered by the municipality, when the local detailed plan or an amendment to it is mainly required by private interests and drawn up on the initiative of the landowner or other titleholder, the local authority is entitled to charge the costs incurred in drawing up and processing the plan, also the local authority is entitled to charge half of the costs of drawing up the master plan in shore areas, in shore areas landowners prepare the draft of the plan and pays for it.	The cost to draw up of the local plan is covered in general from the budget of the municipality. Only the cost of drawing up or changing the local plan which is resulting from the allocation of public investment of national, regional or county importance is covered respectively by the state budget, the budget of the region or county budget. The private, commercial developer has neither the right to organize/produce nor to finance plans.
Infrastructure costs Development compensations versus systems of planning charges and betterment charges	Development compensation concerns only the local detailed plan. The landowner, who gains significant benefit from the plan, may be obliged to take part, in paying the infrastructural cost. The maximum 60 % of the plot value increase caused by the local detailed plan can be collected as development compensation. The discussed costs include: - the acquisition, planning and construction costs of streets, parks and other public areas both in the plan area and outside it that	System of planning charges – a special one-time fee and betterment charges If, in connection to the enactment of a local plan or its amendment, the value of the property has increased, and the owner or perpetual user sells the property, municipal administrator gets one-time fee, as set out in the local plan. This one-time fee is set out in relation to the percentage increase in the value of the property; it cannot be higher than 30%. The fee is charged in cases when the owner sells the real estate within 5 years

	<p>substantially serve the plan area</p> <ul style="list-style-type: none"> - the costs incurred from acquiring land to build public buildings that substantially serve the plan area, relative to the benefit they bring to the plan area - costs incurred by local authorities from soil improvement and from necessary noise abatement in the plan area and the costs incurred from planning that have not been collected 	<p>from the date when the local plan or its revision came into force.</p> <p>Betterment charges are levied after creation of conditions for the connection of property to individual devices of the technical infrastructure or conditions for the use of built roads. The construction of technical infrastructure is understood as building of roads and underground, on ground or above ground pipes or infrastructural equipment for water, sewage, heating, electrical, gas and telecommunications. The betterment charges depend on the increase in land value caused by the construction of technical infrastructure facilities. The value of betterment charges shall not be higher than 50 percent of the value of the difference between the value of the land before and after the technical infrastructure facilities are built.</p>
Transfer of street and public road areas to the municipality	<p>When the local detailed plan comes first time into force, the road area of an existing public road and any street area not previously in the possession of municipality included in the plan area are transferred to the municipality's ownership without compensation. The area can be transferred without compensation if the area does not exceed 20% of the total land owned by the landowner in the local detailed plan area, or is not larger than the building volume permitted for the land remaining in his/her ownership</p>	<p>The landowner must transfer to the local authority's ownership those parcels that have been separated for streets, and in return should receive compensation in cash or in the form of land</p>
Compensation to landowners for land use restrictions included in the local plans	<p>Compensation is paid when the landowner cannot use the area in a manner generating reasonable return</p>	<p>Compensation is paid in connection to the enactment of a local plan or its amendment</p>
The right to development gain		
Increase in land value due to planning	<p>Municipalities are often acquiring the land before planning and in this way the increase in land value due to planning comes to the municipality,</p> <p>Expropriation is allowed without land-use plan, the cutting of the unearned increment is a normal practice in the case of</p>	<p>Passive land policy,</p> <p>Expropriation allowed in the areas covered by the local plans which are designated in the plan for public purposes, therefore an increase in land value due to planning belongs to the private landowner</p>

	compensation for land use restrictions	
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The way in which the rights are delineated and allocated in relation to economic right in land development in Poland, puts the representatives of municipalities in a much less favourable position compared to the representatives of municipalities in Finland. The delineation and allocation of rights in land development processes clearly favours developers in Poland. At the negotiation table the representatives of municipalities in Poland have less bargaining power in comparison to the developers. This is a concern especially because of the lack of adequate obligations to cover the development costs. In this case the link to efficiency problems like the lack of the provision of infrastructure is visible.

In addition the right to the increase in land value due to planning and cutting this increase in the expropriation process favours private developers and landowners in Poland in comparison to Finland.

Chapter Ten

THE PROPERTY RIGHTS REGIME IN LAND DEVELOPMENT. DISCUSSION AND CONCLUSIONS

In this chapter I will discuss the link between the property rights regime and the processes of land development.

The chapter is drawn as follows. The first part (section 10.1) compares the distribution of rights within the property rights regimes in Poland and Finland. The second part aims to present the influences of the property rights regime on land development processes. Therefore, in Section 10.2 the distribution of rights and duties in land development is discussed in relation to the model of land development process adopted in this study. The incentive system within the property rights regime for different land development processes will be discussed. The deontic proposition of rules will be used in order to show the influences of the property rights regime on land development processes. In part 10.3 the results achieved in the light of the theoretical framework discussed in the early part of the thesis are presented. Section 10.3.1 discusses how property rights should be delineated and assigned to improve market efficiency. This section includes recommendations for the scope of changes in the delineation and allocation of rights in the property rights regime for land development in Poland. In Section 10.3.2 an attempt is made to link property right regimes not only to the processes of land development but also to the selected efficiency problems. The property rights regimes will also be evaluated based on the theoretical concepts introduced in first part of the thesis (10.3.3). Section 10.3.4 emphasises the importance of institutional hierarchy of property markets by pointing the influence of social capital on development processes. Finally, Section 10.4 concludes the research. Section 10.5 includes recommendations for future research.

10.1 Comparison of distribution of rights within the property rights regimes in Poland and Finland

In both countries, the constitutional protection of property can only be deviated from the protection principles according to law and with full (Finland) or just (Poland) compensation.

Section 15 of The Constitution of Finland constitutes the primary rule concerning protection of property:

“The property of everyone is protected. Provisions on the expropriation of property, for public needs and against full compensation, are laid down by an Act.”

The article 21 of the Constitution of the Republic of Poland of 2 April 1997 provides:

- “1. The Republic of Poland shall protect ownership and the right of succession.*
- 2. Expropriation may be allowed solely for public purposes and for just compensation”*

The article 64 provides:

- “1. Everyone shall have the right to ownership, other property rights and the right of succession.*
- 2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.*
- 3. The right of ownership may only be limited by means of a statute and only to extend that it does not violate the substance of such right.”*

In Finland a full compensation is mentioned. In Poland just compensation is required. In practice the use of real estate could be limited in many ways and by many laws, e.g. the law concerning land-use planning, environment protection, nature conservation or real property formation. Therefore, private property ownership is limited not only by the risk of expropriation but also by other types of land-use restrictions laid down by legislation. These restrictions do not necessarily include a transfer of ownership, however, they do limit landowners' right to their properties and thereby limit the scope of ownership (Nuuja & Viitanen, 2008).

When we look at the balance of rights between private landowners and the municipality given by the regulatory framework, which was investigated in this research, i.e. mainly the law concerning land-use planning and development and expropriation, we can notice big differences, see Tab.17.

Table 17. Summary of the main differences in distribution of rights and duties between private landowners and the municipality

	Finland	Poland
The position of the municipality in the spatial planning system		
The position of the municipality versus government representations in the spatial planning system	<ul style="list-style-type: none"> • better financial capacity • planning monopoly 	<ul style="list-style-type: none"> • problems with sources of municipal finance • the approvals mechanism
The balance of rights between private landowners and the municipality	<ul style="list-style-type: none"> • planning monopoly, as a rule municipality set up the development possibility, municipality can refuse to plan an area, also reminder to build can be issued by municipality • land use agreements made between private landowners and a local authority regarding planning and the implementation of plans 	<ul style="list-style-type: none"> • every landowner has a right to develop, according to the local plan, or without the local plan according to the decision on conditions of site development • planning work is entirely a municipal responsibility
Municipal right to allocate land	<ul style="list-style-type: none"> • municipality can allocate land and set up the land prices 	<ul style="list-style-type: none"> • public tender process
Public participation in planning procedure	<ul style="list-style-type: none"> • before the plan proposal is made available to the 	<ul style="list-style-type: none"> • participation starts when people have a possibility

	public, interested parties have the opportunity to propose negotiations to the regional environmental centre on the adequacy of the participation and assessment scheme	to send the proposal to the plan
Balance between certainty and flexibility in the development control		
The hierarchy of planning documents	<ul style="list-style-type: none"> hierarchical system, all planning documents at the local level can be legally binding 	<ul style="list-style-type: none"> quasi-hierarchical system no legally binding provisions of framework study the system of decisions on condition of site development instead of planning
The right to develop	<ul style="list-style-type: none"> development rights are limited by municipal planning monopoly in urban areas the development without plan is a rare exception 	<ul style="list-style-type: none"> every landowner has a right to develop, according to plan or based on decision building in areas with no land-use plan becomes the norm
Availability of instruments to control development	<ul style="list-style-type: none"> the local master plan may be legally binding or not area requiring planning restrictions on building prohibition every municipality must also have a building ordinance 	<ul style="list-style-type: none"> the framework study has no legal character and cannot fully direct the land policies in case of the lack of the local plan the area can be marked as an area for which a local plan must be drawn up or another instrument allowed for suspending issuing of the decision on land development conditions only local plans have legally binding provisions for land development
Economic right in land development		
The contribution to the development costs	<ul style="list-style-type: none"> in general the cost of planning covered by the municipality, however municipality is entitled to charge private landowners system of development compensation, 60 % of the plot value increase caused by the local detailed plan can be collected as development compensation for the costs of planned infrastructure 	<ul style="list-style-type: none"> the cost of planning covered by the municipality system of planning charges – a special one-time fee and betterment charges. Planning charges are paid only in case of sale of real estate within 5 years. betterment charges are levied after the infrastructure is built. The value of betterment

	<ul style="list-style-type: none"> • transfer to the municipality, street and public road areas in general for free • compensation for land use restrictions is paid when the landowner cannot use the area in a manner generating reasonable return 	<ul style="list-style-type: none"> • charges shall not be higher than 50 percent of the plot value increase • transfer to the municipality, street and public road areas in general with compensation after enacting the plan • compensation for land use restrictions is paid in connection with the enactment of a local plan or its amendment
The right to development gain	<ul style="list-style-type: none"> • the cutting of the unearned increment (increase in land value due to planning) is a normal practice in compensations for land use restrictions 	<ul style="list-style-type: none"> • right to the increase in land value due to planning belongs to the landowner

There are a lot of dimensions in the differences in the distribution of rights and duties between the municipality and private landowners in both countries. Below it will be discussed in reference to its influence on the selected methods of land development (land development processes).

10.2 The influences of the property rights regime on land development processes

A comparison between the countries considered in this study has emphasised some of the significant differences in the allocation of rights and responsibilities in the regulatory framework of the land development processes. The distribution of rights and duties are at two extremes. Below the delineation and allocation of rights will be discussed in relation to the distinguished methods of land development (Table 18.). The incentive system for certain methods of land development will be indicated in each country.

Table 18. Different methods of developing building land

	MUNICIPALITY elaborate the plan	COOPERATION in local plan preparation	PRIVATE There are no plans
SINGLE DEVELOPMENT	Case 1	Case 2	Case 3
PRIVATE Intermediary By developer	Case 4	Case 5	Case 6
MUNICIPALITY Intermediary Public body	Case 7	Case 8	(Case 9)

The discussion will be divided in reference to each line of planning (each column from the table above). An incentive system for land development processes following plans elaborated by the municipality will be discussed in relation to the first column. Cooperation between the private and the public sector in land development will be taken as representative in relation to the second column from the table above. Development without plans by private developers/landowners will be discussed in relation to the third column. Reasons for preferring one choice over other alternatives will be identified. In addition, in order to follow the concept of land development process adopted in this study, the incentive system for active involvement of actors within each line of planning will be discussed.

10.2.1 An incentive system for land development processes following plans elaborated by the municipality

The position of Polish municipalities is generally weaker in comparison to the Finnish one. The strong position of Finnish municipalities is confirmed by the availability of planning instruments, which may be used to manage the development of municipal areas. Distribution of rights within the property rights regime is clearly an incentive system to persuade active land policy in Finland (case 7). Municipalities in Finland are equipped with a lot of different instruments to do it. The municipal planning monopoly, planning hierarchy, land policy instruments, recapturing the increase in land value in development processes gives an incentive for planning and active policy preparation. Finnish municipalities can choose the policy option either to plan land, which is in their ownership or plan privately owned land and co-operate with private landowners (case 2, 5, and 8). In the case of co-operation there are instruments used to capture the increase in land value due to planning and developers are asked to participate in the cost of the future infrastructure provision. Some Finnish municipalities are traditionally involved in active land policy (owning a lot of land in the city and doing strategic land acquisition for future development of the city, e.g. the city of Oulu). In addition, the municipalities in Finland have better financial capacity, the right to levy municipal tax (income and commercial tax) and the right to levy a municipal tax on real estate based on land value¹⁰⁵.

In general, the Polish municipalities are faced with lack of power and resources to be active in the land development process. Polish municipalities face the choice to either plan and face financial consequences which could sometimes also lead to bankruptcy or to 'not plan' and allow for development according to administrative decisions. This raises the question, how to make an active land policy or elaborate the plans without being equipped with financial resources and instruments? How to enact a plan if in connection to this, the compensation for the decrease in land value should be paid almost at once, even if it does not change the landowners' situation for years or maybe never even being implemented. Nothing like this seems to be possible in Finland. In Finland compensation for decrease in land value due to plan is paid when the landowner cannot use the area in a manner generating reasonable return,

¹⁰⁵ In addition there are other elements, which are not included into the property rights regime, but were studied as a background for understanding the situation in the country and it could be also mentioned here. There are well trained surveyors and planners working for the city administration, capable for perusing an active land policy. The municipal manager (kunnanjohtaja) is a civil servant, which should make easier the continuation of land policy in a long term.

not in connection with the enactment of a local plan or its amendment. In Finland, if the land use restrictions do not affect the “normal, reasonable and sensible use” of the property and are fulfilling the criteria to be general and non-discriminative, i.e. the so-called principle of social obligation, they are not then compensated.

For the Finnish municipalities, the property rights regime clearly structures incentives for pursuing an active land policy and co-operation with big developers (construction companies). The strong municipal position in capturing the increase in land value during the development process and the strong powers vested in the municipality in connection to planning and development issues could make it difficult for small landowners to be active in the market and could lead to incidents of abusing the power against small original landowners.

Polish system in a sense, encourages private landowners to act in the land market by giving them right to develop and limit the enforcement possibilities in relation to planning and development of the local authorities.

10.2.2 An incentive system for cooperation between private and public actors

Cooperation between private landowners and the municipality in land development in Finland is supported by the provision of law in force. In Finland, according to the provision of LUBA, the private developer may finance the detailed plan preparation and participate actively in the plan preparation. Therefore land development contracts usually involve an active cooperation of the land owners or the private developers in land use planning process. The law states that in the land use agreement the rights and obligations of the parties can be defined more widely than the provisions concerning development compensation stipulate (LUBA § 91b). It means that it can contain also other arrangements for co-operation, also in planning.

In Poland, every municipality must organise the public tender process in order to allocate land with some small exceptions, which leads also to pathological results (like establishing a joint venture company in order to transfer land to private developers without tender process). The planning work is entirely a municipal responsibility in Poland. There are no regulations concerning co-operation in financing the spatial plan and land use agreements in spatial planning law. Therefore the cooperation in land development between private developers/landowners is not supported by planning law. However, the cooperation between private and public sector (PPP) in land development in Poland is an emerging trend. Research made for example by (Załączna & Tasan-Kok, 2009) shows that currently in Poland many municipalities are searching for private partners for the implementation of joint projects.

The legal system for co-operation with private developers in planning and land development exists in Finland. In Poland it is still not the issue which legislators pay particular attention to. The co-operative line of planning which refers to the methods of land development chosen in this study is not supported by the planning legislation in Poland.

10.2.3 Development without plan

Significant urban development without any planning is in practice impossible in Finland. Single landowners sometimes just follow the plans (case 1). Bigger developers are involved in discussion with the municipality concerning distribution of development costs (case 5) or in already planned areas development can follow case 4.

In Poland, every landowner and developer has a right to develop. The Polish regulatory framework gives the right to have development requirements determined in accordance with one's application, unless statutory law prescribes otherwise. Distribution of rights and duties in the property rights regime in Poland could be directly linked to the methods of developing building land in the third column identified in this research. This in practice actually happened. Municipalities in Poland could prepare the local plans, but the distribution of financial consequences due to the plan does not give an incentive system to do it. Sometimes this even makes it impossible to bear the financial consequences. In Finland, at the local level there are two plans, which may be legally binding. In addition, the municipalities have the building ordinance, as well. In Poland, only local plans have legal consequences and give protection to the desired development and may be used as an instrument to implement land policy. Framework studies do not fully govern the land policies of municipalities. In Poland, the property rights regime within which the land development process is taking place clearly favours the private landowners and allows the development without planning (case 3 and case 6). Polish local authorities, compared to the Finnish ones, have a limited ability to first establish the land policy (complicated and time consuming mechanisms of approvals in cases of both plans at the local level), and second, reap the benefits of the systems of created policy. The framework study is not legally binding. In case of lack of the local plan every landowner and developer has the right to develop based on the decision on condition of site development not on the framework study. Polish municipalities also have no instruments to capture the increase in land value due to planning. The situation has been developed rather differently. The increase in land value due to planning belongs to landowners, if not to the land speculators.

In Finland, especially in the biggest cities, spatial development is the result of the ordered activities of public authorities. In Poland, random decisions on conditions of land development may substitute the planning process (case 3 and case 6).

10.2.4 Deontic proposition of rules

In this research, the three main elements were identified and proved to be important explanatory variables, which exemplify the differences in the property rights regimes and land development processes. The property rights regimes are built from rules in relation to land. Within the system of rules there are different co-ordination mechanisms: price, trust and imposed rules, as discussed in Chapter Three (p.70-76). How do the rules work as an co-ordination mechanism? An incentive system, as a system of any factors that enables or motivates a particular course of action, was discussed above. Besides the incentive system the rules sometimes indicate more directly that some situations are obligatory or are not permitted.

In deontic logic all propositions of rules are divided into three jointly exhaustive and mutually exclusive classes: every proposition is obligatory, optional, or impermissible (see Fig.2). All recurring situations are shaped by a set of institutional rules, which are prescriptive statements that forbid, require, or permit some action or outcome. Any action or outcome that is not required nor forbidden is permitted. Therefore the absence of a rule forbidding or requiring an action is logically equivalent to the presence of a rule that permits an action. (Ostrom 1990, p.139-142)

Table 19. Rules as a co-ordination mechanism

	Development according the plan elaborated by the municipality		Co-operation in planning		Development without plan	
	Poland	Finland	Poland	Finland	Poland	Finland
Obligatory proposition of rules		Area requiring planning, planning hierarchy, planning monopoly			Decision on land development condition	
Optional proposition of rules	Municipality may draft the local plans			Land use agreements	Every landowner has a right to develop with or without the plan, Option to draft the local plan	Deviation principle
Impermissible proposition of rules			Public tender process, The cost of planning is entirely the responsibility of the municipality			Significant development in urban areas require planning

While creating the links between the methods of developing building land and the rules, it could be stated that the presence of rules permitting the action enable certain action to happen. If the development without plan is not forbidden by restrictive institutions (impermissible propositions of rules) either the plan is not required by the obligatory proposition of rules, the development without plan is the permitted method within the system of rules. On the other hand the rules, which permit some action or outcome (optional propositions), but are not required can be seen as encouraging certain situations to happen. Obligatory and some optional propositions of rules indicate why the process happens (the permissible propositions in deontic logic). Impermissible and some optional propositions of rules indicate the obstacles in certain methods of land development (the gratuitous propositions in deontic logic).

10.3 The results achieved in the light of the theoretical framework

10.3.1 How should property rights be delineated and assigned to improve market efficiency? Recommendations for changes in the property rights regime in Poland

According to the property rights theory in order to improve market efficiency, the deficiencies in the present property rights regime should be repaired, in such a way that the efficiency rules can be met. The solution to efficiency problems that appear on the housing market in the cities in Poland (haphazard developments in the city and the inadequate provision of urban infrastructure) could be a shift towards a more active involvement of municipality in the land development process, increase of municipality's interest in the land development and more integrated development instead of the single development. Nowadays municipalities almost never acquire land for housing development. Municipalities are rather selling land which is in their portfolio. According to Webster and Lai's *subsidiarity rule* (see page 78), the rights associated in the allocation of land should be at the governance level that is also primarily responsible for achieving the policy goals. Therefore in the case of choice of governance model, the subsidiarity rule principle suggests assigning governance functions to levels of organisation and governance most able to deliver those functions in pursuit of accepted goals. In Poland it is the municipality. The suggested reassignment of rights should concern the improvement of the availability of spatial planning instruments at the local level, which would allow for more active land policy and land policy implementation. This could concern the role of the framework study or the possibility to capture the increase in land value in the development process. The principle of *subsidiarity* is well known in the economic literature and has been formally also adopted by the European Commission (Enemark 2006)¹⁰⁶. Summary of three main recommendations concerning reassignment of delineation and allocation of rights is presented in the table below.

Table 20. Main deficiencies in the property rights regime in Poland

The deficiencies in the present property rights regime in land development
The complicated approval mechanism of the local plan and the framework studies, not clear assignment of the responsibilities between parties involved in land development process
The right to develop based on the decision on condition of site development not on the framework study, given to every landowner and developer (in case of lack of local plan)
The role of the framework study as a steering policy document

¹⁰⁶ Enemark 2006 pointed out that “Such decentralised provision, it is argued, will produce not only more efficient service through making better use of local knowledge, but it will also lead to greater participation and democracy, increased popular consent to government, and hence improved political stability. It should also produce increased resource mobilisation and reduced strain on central finances, greater accountability, and more responsive and responsible government in general. Therefore, it is not surprising that many countries have seen decentralisation in and of itself to be intrinsically valuable.”

According to the Webster and Lai's *public domain rule* the goods can be taken out of the public domain by assigning property rights to them: the externalities should be internalised. Negative effects from lack of infrastructure, for example provision of public space could be solved by assigning rights to the developers over the negative effects due to the lack of this infrastructure. Van der Krabben (2009) suggested that the negative effects could be compensated. However, the idea of assigning the rights over the negative effects of development activity by taking them out of the public domain and the scope of compensation requires further studies. The approach of proprietary governance is developing now (Van der Krabben 2009).

How could the suggested solutions be implemented in Poland? The two types of possible interventions distinguished by Needham (2006) can be considered: interventions, which aim to structure the market and the traditional interventions which are meant to regulate the market. The rights in land (part of property rights regime) can be created and structured in such a way that the desired land use is achieved by people working freely within that structure. The legislator can also influence, or steer, actions in the market in rights in land so that the outcome of people acting in that market is a desired one. The use of one way, or the combination of two ways in a way which uses scarce resources most efficiently requires further studies. The purposefully organising the markets in order to achieve the goals of planning and land policy requires empirical evidence. It could be the interesting solution also in Poland to support traditional ways of regulating the market.

10.3.2 How to link the methods and distribution of property rights with efficiency problems?

The aim of this study is to increase knowledge about the role of the property rights regime in the land development process and to contribute to the further conceptualisation of the impact of the institutions on land development. The analytical approach adopted in this study limited the discussion to the selected elements of property rights regimes (explanatory variables and delineation and allocation of rights and duties in relation to them) and the selected methods of land development. However, the material collected in this research also indicates the possible influence of property rights regimes on the efficiency problems that appear in the provision of land.

The efficiency problems in general characterise the land and property market, which is fundamentally a consequence of the heterogeneity of properties (Evans, 1995, 2004). In addition it is very difficult to differentiate the influence of property rights distribution from the wider sociological, historical, political and other contexts. However, the distribution of rights and duties within the property rights regime could be seen as an element, which also has a significant impact on established practice of land development, as was discussed above. The distribution of rights within the property rights regime can explain the efficiency problems, for example the inadequate provision of infrastructure in Poland. Finnish municipal right to collect development compensation is much wider than in Poland. Finnish municipalities may collect the estimated costs of implementing a plan and the costs incurred by the local authority with respect to measures taken in advance to implement the plan. In Poland the levy charged for the increase of value of the real estate in connection with the introduction or revision of a local plan is paid only if the owner or perpetual usufructuary sells the real estate within 5 years of the date when the plan or its revision came into force. Real

estate owners in Poland are obligated to pay infrastructure betterment levy only after the infrastructure facilities are built.

Another efficiency problem which could be linked directly to the property rights regime is the problem of the provision of non-profitable uses in the city. In Poland, development control is very limited. The system which allows development based on administrative decisions does not take into consideration the allocation of land for non-profitable functions. By active land policy and wider development control, municipalities could implement less profitable uses (parks, open spaces, social housing). Municipalities are motivated also by other factors than market or commercial considerations. However, there are several obstacles for the Polish municipalities to be active in the land market.

Haphazard development in the cities in Poland can also be linked to lack of planning and methods of land development which follows the third column of the model distinguished in this study. These are just examples of how to link the characteristics of the property rights regime and methods of land development to the efficiency problems with the provision of land.

10.3.3 Evaluating the property rights regimes

For the Finnish municipalities, the property rights regime clearly structures incentives for pursuing an active land policy and co-operation with big developers (construction companies). The strong municipal position in capturing the increase in land value during the development process and the strong powers vested in the municipality in connection to planning and development issues could make it difficult for small landowners to be active in the market and could lead to incidents of abusing the power against small original landowners.

For Poland, the incentives are developed towards development following the line without planning. In Polish cases the distribution of rights and duties determines the difficulties in the active involvement in the land development process by the municipalities. Detailed analyses indicate that there are significant weaknesses in the regulatory framework. In Poland, there is a mixture of discretionary systems (non-binding plans, more market-driven development) and a plan-led system with legally binding plans. But there is no instrument to negotiate the planning gain, as it is in a conceptual development-led system. Neither is there a certainty for developers based on plans, as it is in a conceptual plan-led system, due to the existence of an instrument, which allows substituting the planning process.

The Finnish system tries to combine the advantages of both conceptual systems: plan-led and development-led. The plans are legally binding and developers have a certainty for future development possibilities. On the other hand, the system supports the co-operation in land use planning and land development with developers.

In Poland, in addition to the weaknesses in the regulatory framework, the level of social capital is low. As a result, existing spatial planning tools are treated in an instrumental way and even the opportunities arising from the law are forfeited. Due to lack of local plans, the decision on conditions of site development becomes substitutes of a development policy. This

disintegrates spatial planning and development. Discretionary decision-making is conducive to corruption, which in turn contributes to the exceptionally low level of social trust in local authorities in Poland.

Finland is a country thought to have one of the lowest corruption level in the world. However, the strong powers vested in the municipality in connection to planning and development issues also leads to incidents of abusing power for private gain. For instance, Mäntysalo (2008) analyses the case known in Finland as “Tulihta”. The Tulihta case is the only one in Finland where a planner, due to misconduct in public office, has been convicted and imprisoned. This case, although highly exceptional, presents the possible uses of the different types of powers and their interplay in the planning process in a plan-led spatial planning system.

The system of duties in relation to land development in Finland does not favour small landowners to be active in the market. Housing market is dominated by a few big construction companies. In the case of a single family house developed in the area covered by the local detailed plan, the development compensation cannot be allocated to a landowner. In other cases the development compensation system does not provide clear rules as to how much should be paid. The negotiation position of the small landowner negotiating with the municipality (about the content of the plan, financing infrastructure, etc.) is not as well balanced as in the case of the professional developer (construction companies in Finland).

Three explanatory variables also relate to different land development structures within the property rights regime (see page 74). The delineation and allocation of rights in relation to the position of the municipality in the development process, the certainty versus flexibility in development control, and the economic right in land development decide if the land development structure represents more regulatory, cooperative or market regimes. The property rights regime is a combination of three different governance structures (land development structures). The land development structure in Poland represents more market-regulatory regime. The land development structure in Finland represents more regulatory-cooperative regime.

10.3.4 Social capital

In Chapter Three the emergence of property rights was discussed in relation to transaction costs, political power and path dependency. Further, after reviewing the empirical material collected in this study, I would argue that the final choice of land development structure is significantly influenced by the social capital. Social capital was not the focus in this study, but its significance was noticed during the study. Social capital includes shared values and rules for social conduct including trust and civic responsibility. Social capital is often called the cement keeping together a community (society), and as such is indispensable for long-term development (Havel & Załączna, 2009).

The involvement of people in the discussions concerning development proposals, or the level of fulfilling the governmental duties by self-government representatives is influenced by the level of social capital. Even if the prescriptive statements of rules support the active land

policy and regulatory land development structure, the final result is influenced by the level of social capital and the choices made by market actors.

In Finland, there are local master plans for 97 % of the municipalities. About 20% of the plans (7% of the total land area) have legally binding provisions and the number of local master plans with legally binding regulations is increasing (Viitanen *et al.* 2003). In Poland very often municipalities were neither exercising their rights, neither their responsibilities with respect to spatial planning. The increase in the area covered by local plans was insufficient relative to the needs and even though municipalities have insufficient finances, they make little use of the instruments created especially for improving this situation (NIK 2003, 2007).

Therefore, the actual outcome in the market results from the choices made by actors. The market actors make a choice within or outside the framework of property rights regime. These choices, for example, are dependent on shared values and rules for social conduct including trust and civic responsibility of market actors. There is always a reciprocal relationship between the institutional environment, property rights regime as an institution and property market organisations.

10.4 Final conclusion

The comparison in this study indicates that the property rights regime as an institution ultimately determines the processes of land development. Therefore, property rights institutions - the rules designating who bears the economic rewards and costs of resource-use decisions, structure incentives for economic behaviour within the society as the property rights theory assumed. Diversity in land development processes cannot fully be understood by merely analysing the demand for and supply of land, leaving unnoticed the institutional environment and the property market as an institution. The institutions matter but in many institutional analysis we are lost in the web of reverse relations. The institutional analyses are also becoming very general, because it is difficult to discuss in detail so many aspects at the same time and build the logic of relations. An approach of this study to concentrate in more detail on one aspect of the property market as an institution seems to be a successful approach. Although within each selected level, as for example the level of the property rights regime, there are many relations to other aspects of market functioning. The rules affecting certain choice are made within another set of choice rules that are themselves made within a set of other choice rules. Therefore it is difficult to build the precise boundaries between different levels of institutional analysis. Sometimes it is needed to go behind the assumed scope of research. We can distinguish the explanatory variables within the property rights regime and relate it to the outcome of the land development process, but still there are other elements than property rights distribution involved in the discussion. Other elements relate, for example, to the influence of social capital on the functioning of the framework of rules of property rights regimes.

To conclude, the empirical analysis shows that institutions are significantly important for land market. Institutional settings influence the land development processes and in consequences the outcome of the processes. The empirical analysis shows a complex of rules other than just

the reaction to the price and supports the theoretical argument about the relevance of institutions in theories of land markets.

Chapter Three discusses the scope of the possible intervention and criteria for evaluation of the arrangements of property rights regimes. However, at any stage of this research the aim was not to apply some solution from one country to another. This is commonly acknowledged that the comparability does not mean the transferability of the ideas. For example Davies *et al.* 1990 provided an actual comparison of planning control in five countries and concluded the comparative research in the following way:

“The comparative studies (...) show that in many respects the five countries are facing broadly similar issues about the control of development in terms of procedures and substantive content. But, despite the similarities, the chief impression from the national accounts is that each country’s system is actually based most strongly in its history and constitution. It follows that any simplistic transfer of ideas and methods between countries, or even drawing lessons from other countries, is something to be treated with caution and understanding.” (Davies et al. 1990, Preface)

In line with the above statement this study stopped at the moment of trying to answer how the institutional settings influence the methods of land development. This study does not propose the transfer of methods or land policy tools. The proposal of changes requires more attention and studies concerning other political or historical factors, therefore studies of institutions at the other levels of analysis, as Chang (2006) puts it:

“More importantly, in the same in which there are a lot of tacit elements in technology, there are a lot of tacit elements in institutions. So some formal institutions that seems to be working well in an advanced country may be working well only because it is supported by a certain set of non-easy- observable informal institutions.”

10.5 Future research

In Chapter Two and also Chapter Five I have discussed the complexity of institutional analysis and clearly explained the research focus. The interaction between different levels of institutional analysis and an effect of factors like e.g. relative maturity of the real estate markets, the historical influences on the relationship between the public and private institutions involved, and the social, economic and cultural differences were purposefully excluded from this research. As a first, the interrelation with other institutional levels will be a natural future research area.

In the chapters above I have established the relation between the property rights regime (the explanatory variables within the regime) and the way the land is developed. The identified methods of land development can also be easily linked to the efficiency problems, especially in Poland. The analysis of the property rights regimes in the countries concerned in this research indicates the possible situations when the property rights are not well-assigned (the ‘deficiencies’ in the property rights regime). This concerns both countries. In both countries there are outcomes of the markets, which are not satisfactory. For achieving certain goals of land policy the ‘deficiencies’ in the property right regimes could be improved e.g. by taking

into consideration the efficiency rules. Whether the particular assignments of property rights are appropriate should be case specific. Therefore, for further research it would be interesting to study different efficiency problems, which appear in the particular segment of the property market, e.g. retail, housing or industry, and discuss how different sorts of property rights rules might be expected to influence economic efficiency, distributional effects, and the realisation of land-use planning goals.

The property rights distribution in Poland and the way land development is taking place in general differs to a great extent from the discourses and practice developed within the areas of planning policy in Western European countries. Continuous interaction between various participants has been recently emphasised, as Healey (2007, p. 278) pointed out: *“the ongoing struggle has been to maintain a kind of mutual transformation process that weakens the old boundaries of a sectoralised, public sector dominated governance structure, to allow different ways of practicing and different ideas about issues such as accessibility, urbanity and liveability”*. The situation in Poland is an ideal laboratory for testing the ideas of proponents and opponents of land-use planning in general. The planning activities in municipalities are remaining low but at the same time the country faced the dynamic development of modern office, retail, and warehouse real estate sectors. The advantages and disadvantages associated with this dynamic development in the context of Polish land development regime would be also the potential area of future research.

This research also introduced a language for comparative analysis of systems of planning and development. We can check if the type of land development structure is more regulative, co-operative or market-like by checking the nature of explanatory variables.

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(the Expropriation Act)

The Act on the Changing of Municipal Division of 1926 180/1925, repealed

The Act on the Protection of Buildings 60/1985

The Antiquities Act 295/19630

The Building Act 370/1958, repealed

The Constitution of Finland 731/1999

The Finnish Local Government Act 365/1995

The Forests Act 1093/1996

The Highway Act 503/2005

The Inheritance Code 40/65

The Land Use and Building Act 132/1999 (LUBA)

The Land Use and Building Decree 895/1999 (LUBD)

The Leasehold Act 258/1966

The Nature Conservation Act 1096/1996

The Pre-emption Act 608/1977

The Private Road Act 358/1962

The Real Estate Formation Act 554/1995

The Real Estate Register Act 392/1985

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APPENDIX A

DELINEATION AND ALLOCATION OF RIGHTS IN LAND DEVELOPMENT PROCESS IN FINLAND

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1. Introduction

Finland is a northern country with 5.3 million inhabitants, has an area of 338.000 square meters and an average density of 15.7 people per sq. Since 1917 Finland has been an independent parliamentary republic. About a quarter of the population lives in the Helsinki metropolitan area. Finland is divided into 6 provinces (läänit) and 20 counties (maakunta). One of the provinces - the Åland Islands (Ahvenanmaa) - is an autonomous region. There are 348 municipalities (kunnat) since the beginning of 2009. The sizes of the municipalities in Finland vary a lot in terms of the number of inhabitants. (Finland at a glance)

The municipality's position in the administration structure

According to section 121 of The Constitution of Finland (731/1999) of 11 June 1999 Finland is divided into municipalities, whose administration shall be based on the self-government of their residents¹⁰⁷. Municipal administration and the duties of the municipalities are laid down by the Finnish Local Government Act (365/1995). Municipalities are responsible for providing welfare services to their residents. In relation to land, municipalities supervise land use and construction in their area, and promote a healthy living environment. All the municipalities in Finland have the same power, similar rights and obligations even though there are big differences in resources, size and population. (Services for residents)

Municipalities in Finland have the right to levy municipal tax. Therefore the earned income of individuals in Finland is the subject of the state income tax and the municipal tax. The state tax on earned income is levied according to a progressive tax scale and varies between 10.5 to 33.5 per cent. Municipal income tax is levied at flat rates, which are set by each municipal council annually. For 2005 the rate of municipal tax varies between 16 and 21 per cent (18.30 per cent average). In addition municipalities have a right to levy a municipal tax on real estate (The Real Estate Tax Act (654/1992)). This tax is levied on all real estates situated in Finland unless a particular statutory exemption applies like exemption of levy taxes to water, forest and agricultural land. The revenue goes to the municipality in which the real estate is located. (Taxation in Finland 2005, The Real Estate Tax Act)

The structure of revenue is as follows: almost half of all municipal revenues consist of municipal income tax paid by residents, real estate tax and a share of corporate tax. Fees and charges account for about a quarter of municipal revenues. Central government transfer accounts for less than one-fifth of all municipal revenues. (Municipal Finances)

The decision-making power of local authorities is exercised by a council elected in municipal elections for a period of four calendar years (The Finnish Local Government Act, §1, §9). The municipal manager (kunnanjohtaja) is a civil servant.

¹⁰⁷ It is like it was earlier as well (Werdi, 2009)

Protection of property rights

Section 15 of The Constitution of Finland constitutes the primary rule concerning protection of property:

“The property of everyone is protected. Provisions on the expropriation of property, for public needs and against full compensation, are laid down by an Act.”

Therefore, the constitutional protection of property can only be deviated from according to law and with full compensation. In practise the use of real estate is limited in many ways and by many laws, e.g. the law concerning land-use planning, environment protection, nature conservation or real property formation. Therefore private property ownership is limited not only by the risk of expropriation but also by other types of land-use restrictions laid down by legislation. These restrictions do not necessarily include a transfer of ownership, however, they do limit landowners' right to their properties and thereby limit the scope of ownership (Nuuja & Viitanen 2007).

Land as a real estate

‘Kiinteistö’ in the Finnish language means a real estate. According to The Real Estate Formation Act (554/1995) section 2, real estate refers to an independent unit of land ownership, which under The Real Estate Register Act (392/85) is to be entered into the Real Estate Register as real estate. The following are entered into the Real Estate Register as real estates: 1) estates; 2) plots of land; 3) public areas; 4) State-owned forest lands; 5) conservation areas; 6) areas partitioned based on redemption; 7) areas partitioned for public needs; 8) separate reliction areas; and 9) public water areas (The Real Estate Register Act, § 2). Real estate comprises of the area belonging to it, the shares of the joint property units and of the joint special benefits as well as the easements and the private special benefits belonging to the real estate (this is called dimensions of real estate (The Real Estate Formation Act, § 2).

In general, real estate is defined as an object consisting of physical land and as constructions made by man to it. It is a physical, tangible item, which can be seen and touched including all over ground and underground additional structures. However, in some cases the real estate registered in the Real Estate Register can consist also only of a right without any land or water areas, i.e. it's not physical at all in this case (e.g. easements).

A real property (immovable property) (kiinteä omaisuus) contains all rights and utilities that are connected with owning a real estate. A real property is a non-physical concept. Real estate is transferred when right of ownership is transferred.

Real estate includes also the buildings belonging to the same owner. Buildings on the leased land are treated as a movable property. Real estate (land and buildings) can be owned directly or in the form of real estate securities (this form is called indirect ownership or owning through shares). Real estate securities mean usually ownership of shares in a real estate company or in a residential housing company. (Viitanen *et al.* 2003, p.37)

The right of ownership is the right to enjoy and dispose of objects in the most absolute manner. The definition of the right of ownership is negative, i. e. it includes all rights to the object, which have not been ruled out on some grounds, e. g. legislation, an order from an authority or a legal act.

2. Methods of developing building land in the housing sector in Finland

Summary of methods

There are big differences between municipalities in Finland concerning land policy, planning and the use of instruments which promote the implementation of land-use plans. The main reason is that the size of the municipalities varies greatly. Some of the municipalities pursue an active land policy. Many others are quite passive concerning plan implementation and land acquisition. In municipalities with mainly privately owned land, the municipal council often follows a more development-led line according to the interest of the landowners (Larsson 2006). On the other hand, for example Helsinki, the capital, traditionally persuades a strong land policy owning over 50% of its administrative area¹⁰⁸. (Virtanen 2003). Other typical phenomenon of land development in many bigger Finnish cities are land use and development agreements (further named following The Land Use and Building Act of 2000 land use agreements), which are the result of an active cooperation with developers or land owners in land-use planning and development. Therefore on the one hand we have a situation of so-called active land policy, where the public sector takes the lead in land development process. On the other hand there are situations where passive land policy prevails and private actors take initiative in the implementation of land-use plan¹⁰⁹. In between there are possibilities of cooperation in the preparation of a land-use plan¹¹⁰.

There are no professional developers specialized in land development in Finland. In Finland mainly construction companies are concerned with private land development projects. Therefore, construction companies in addition to their core construction business, actively participate in land acquisition and planning and carry out the projects from the initial stage till the completion in construction. After the construction, the construction company disposes ready buildings or flats on the real estate market. (Viitanen *et al.* 2003 p. 11, 14)

¹⁰⁸ In January 2009 parts of neighbouring municipalities were incorporated into the Helsinki city area. Therefore this figure could be different.

¹⁰⁹ See the description of cases in Mierzejewska & Viitanen (2005)

¹¹⁰ At the local level there are two main land-use plans: the master plan and the local detailed plan. The characteristics of both plans will be introduced below.

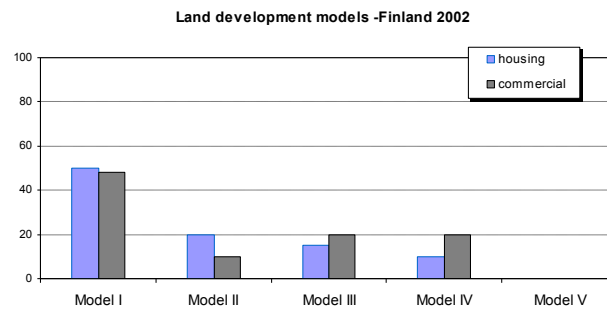


Figure 15. Five methods of developing building land (Source of data: Viitanen 2000, p. 249)

Fig 1. presents the situation in Finland in relation to the methods of developing building land distinguished by Dransfeld and Voß (1993), which are referred to in this research. According to Viitanen *et al.* (2003, p.59) the share of the development on the municipal assigned land is approximately 50% to 60% of all developments. By estimation 10% to 20% of plans involve land use agreements and the popularity of agreements in the municipalities is increasing. Development of bigger areas usually results in closer cooperation between the local authority and the construction company in land-use planning. Two methods of developing building land are discussed below in more detail.

Active land policy

Finnish municipalities have for many years a responsibility in urban land policy. It could be said that it is the traditional way in Finland that the bigger municipalities pursue an active land policy¹¹¹. Active land policy means that the municipality buys the land, puts an infrastructure on it and then disposes the building sites to private parties or develops further land by using its own resources. Therefore, in this case the municipality initiates the land development process. Usually after the formulation of the direction of spatial development of the city, the municipality is starting at once, if necessary the land acquisition. By acquiring areas for urban development before the area is planned the municipality can carry out its housing and other policy plans. However, in general in Finland the role of the public sector authorities in housing production and regulations has been decreasing, as Larsson (2006, p.141) puts it: *“the trend now is to concentrate on creating the general conditions for housing production, for improving housing conditions and the effective functioning of the housing market”*. Kurunmäki (2005, p.85) pointed out that use of an active land policy has worked well when development has occurred on raw land. He argues that the trend of the inner city re-development brought more involvement of private landowners into the

¹¹¹ Owning the land, cities performed strong land policy. In 2002 municipalities used approximately 13 € per capita in land acquisition, whereas income from land sales were approximately 40 € per capita. In addition to that, municipalities collected ground rents for approximately 80 € per capita. The staff costs of land policy were about 2,7 € per capita. In this case municipalities prepared a statutory plan concerning future development, and developers are adapting to it. (Viitanen *et al.* 2003, p.10)

development process. This resulted also in increased significance of public-private contracting.

It is worth emphasising that the active land policy is strongly influenced by the municipal land ownership, which has a long tradition in Finland. Finnish towns established before 1906 (35 towns in total, which currently account for approximately one-third of all towns in Finland) received donated land from the former sovereigns. Sale of donated land was prohibited till 1943, when the restrictions on selling urban land was first partially removed in respect to land located outside the town's planning areas. The municipality could sell land in all areas just in 1962. Private entities were only allowed to lease the land. Only the Act on the Changing of Municipal Division of 1926 (180/1925) allowed the incorporation of privately owned land into urban municipalities. Thus private land in urban municipalities was increasing after 1930. (Virtanen 1991, 2003)

Co-operation between city authorities and private parties in land development

Finland has a long tradition of real co-operation between city authorities and private parties in land development. Cooperation with the private sector in land development dates back to about 50 years ago in Espoo, with the establishment of the Tapiola Garden city. The company 'Asuntosäätiö' was the key player in the Tapiola project. In the 1960s and 1970s in many bigger Finnish cities the large-scale land use agreements, which were aimed at the development of whole neighbourhoods, have been signed with big construction firms, who were the owners of the land. This was due to the insufficient resources of municipal economy, weak land and planning policies and bad housing situations. The main reason for signing such big land use agreements was to promote housing. Contracting between private and public parties in Finland has been seen as an effective tool for providing housing areas. The construction companies acquired the land, had it planned and constructed the infrastructure and residential buildings according to the agreement with the municipality. This development concerned usually large areas of so-called raw land and lead to suburban growth of the cities. The history of private land development in Finland is summarized for example in an article of Leväinen & Korthals (2005):

"In 1895 to 1930 there were twenty companies acting as land speculators in the outskirts of Helsinki. They bought land near the railways and sold it to ordinary people for building sites (Vuorela 1979, p.31-32). This was possible since building permits did not become compulsory in the rural municipalities until 1949 (...). The first private area for land development was the area of Käpylä in Helsinki in the 1920's (Vuorela 1977, p.196). The legal form to realize Käpylä was co-operative. On grounds of the good experience in Käpylä, big social organizations and other authorities established housing associations of public utility in the end of the 1930's for building dwellings (...). In 1958 the Building Act came into force. The Act regulated that town planning became a monopoly of the city. This meant that the urban municipality (city) was due to make decisions on town plans. The situation in the rural municipalities was different at that time. In rural municipalities the landowner and the municipality could make an area-building plan together. The landowner could also make a proposal for an area-building plan directly to the provincial authority, and when the municipality gave the statement on the suggested plan the provincial authority duly ratified the plan. This situation and the scarcity of building land

in Helsinki in the end of the 1950's effected constructors to move to the municipalities next to Helsinki. Under these circumstances a housing association (Asuntosäätiö) bought land in Tapiola and started to develop it. Tapiola was planned and build totally by Asuntosäätiö. (Rönkä 1989, p.16-17)

The first features of the true land development can be seen in the 1950's in Espoo where the first agreements concerning public works were made. For instance, in Niittykumpu a municipal authority constructed the water supply line to the area and the building constructor paid for it. A similar agreement was made in Vantaa (Kaivoksela) in 1964. Land development became more common in Helsinki in the 1950's when the city council of Helsinki disposed larger areas to one or several construction companies (...). Helsinki, Espoo and Vantaa started to agree on land management on the land of the constructors after 1965 in the proper sense of the word. (Rönkä 1989, p.17)"

Therefore, in Finland private land development, based on some kind of contracts with local authority, was a popular practise already in the 1960's and 1970's. This way of acting was criticized a lot (Viitanen, 2009). Later, the role of private enterprises has been smaller. After the 1980s, co-operation between municipalities and the private sector has been concentrating more on smaller and varied types of projects, which involved the cooperation in urban renewal projects, planning and development of small raw land, building of commercial centres and sports arenas, and development of tourist centres and summer house areas in the countryside. After the adoption of new legislation in 1999 the agreements (even the bigger once) have started to be more common in the 2000's. (Viitanen, 2009)

Typical targets for land use agreements are elaboration or changes of existing plans, development of raw land, and the implementation of various kinds of projects, such as housing schemes, industrial sites, business parks and commercial centres. Municipalities achieve two kinds of goals in contracts with the private partners. The first type of goal concerns land transactions. The municipality buys, sells or exchanges land. Secondly, the municipality transfers the legal responsibilities to private partners concerning construction of the infrastructure, land use planning, or area building. The agreement usually includes details of the area involved, planning and payment of planning costs, the estimated amount of building rights to be planned, a timetable for the building, building and paying for the infrastructure, principles of conveying areas, dwelling production, securities and sanctions for breaking the agreement. (Viitanen *et al.* 2003, p.60)

Various researchers in Finland classify the contracts with private developers differently¹¹². Vuorela (1977 cited in Leväinen & Korthals 2005) distinguished different types of land use agreements depending on who was the owner of the land. When the municipality is the landowner it enters into the reservation decision and disposal agreement. In cases where the constructor is the landowner, the contract is known as 'land development contract'. In cases where municipalities and constructors both own the land in the development area, they enter into a 'co-operation contract'. Contracts with other landowners are classified as land development contracts.

¹¹² In that time, the legislation in Finland did not include any section on land use agreements

Rönkä (1989 cited in Leväinen & Korthals 2005) was able to organise land use contracts into categories based on features found in each contract (Table 19.). He argues that contracts are rather similar and not dependent on the type of landowner. However, in special features in the types of contracts he distinguished, ownership was an important characteristic. In cases where the municipality is the original landowner, contracts are called ‘site disposal contracts’. Further distinguishing is made when the municipality disposes sites to several constructors (traditional model) or when the municipality disposes sites to a constructor as compensation for permitted building in other areas. First is the regular land purchase, in which the municipality sells its own land to constructor. Second is when the municipality and the constructor have made an agreement in some other area and the municipality is not willing to make a land use plan according to the contract in that area. In this case this is the way to compensate the loss of a constructor by giving building rights in the other areas.

Rönkä (1989 cited in Leväinen & Korthals 2005) also found contracts called pre-agreements, where the original landowner is other than the municipality. In these pre-agreements, the area is transferred from the constructor to the municipality. There are three further alternatives. The first is when the constructor acquires funding for the land purchase to the municipality and the municipality has not got enough funding of its own. The second is the situation when the constructor has made a pre-agreement on land purchase or land development with a landowner and the constructor is transferring this pre-agreement to the municipality against the possibility of getting building rights. The third is similar to the Dutch exchange of land to building rights and it means that the municipality buys land against building rights.

Table 21. Types of land development contracts (Source: Rönkä 1989 cited in Leväinen & Korthals 2005)

Type of contract	Special features
Regular land development contracts	Land owner as the contractor for construction (Concession)
So-called pre-agreements (area transfers from the constructor to the municipality)	The original landowner is other than the municipality 1) Constructor acquires funding for the purchase 2) The pre-agreement made by the constructors is transferred to the municipality 3) Municipality “buys” land against permitted building rights (Exchange of land for building rights)
Site disposal contracts	Municipality as the original landowner 1) Municipality disposes sites to several constructors (Traditional model) 2) Municipality disposes sites to a constructor as compensation for permitted building in other areas

Hautamäki (1999, cited in Leväinen & Korthals 2005) classified the agreements in Finland in the period from 1995 to 1998. He distinguished: framework agreements, raw land agreements for housing, retail or industry, alteration of land use, addition of permitted building rights, small-scale realization, real estate purchases, and construction of infrastructure. Framework agreements, raw land agreements and small-scale realization are similar to those distinguished

by Rönkä. The new form is connected to the process of the cities revitalization, which were under pressure at the end of the 1980's and in the 1990's. In these cases, there are already buildings on the site. The agreements concern the alteration of land use or addition of permitted building rights. (Leväinen & Korthals 2005)

Viitanen *et al.* (2003, p.60) distinguished two main types of land use agreements:

- *“The agreement to implement a plan, which is a detailed agreement between the municipality and the landowner. The responsibilities and the rights for implementing the plan are specified in the agreement. The agreements are attached to the detailed plan.*
- *The skeletal agreement, which is a procedural agreement by nature. It is made for areas that are too large to be planned at once in detail and for projects that are significant in their size or value”.*

In order to try to summarise the general four-dimension model of co-operation between private and public partners in land development process presented by Leväinen & Korthals (2005) is presented in Table 1.), the dimensions of public-private co-operation include: the type of land, owner of land, model of co-operation and type of contract. Every agreement can be placed in one category of these four dimensions.

Tab 22. Classification of public-private co-operation. Source: Leväinen & Korthals (2005)

Dimension	Category
Type of land	Raw land
	Unbuilt sites
	Renewal
Owner of land	Municipality
	Constructor
	Housing developer
	Other
	Mixture
Model of co-operation	Traditional
	Exchange of building rights
	Integral
	Joint
	Concession
Type of contract	Framework
	Pre-agreement
	Site disposal
	Infrastructure construction

Nowadays the co-operation in land development projects involves also interaction and research. An example of innovative contemporary solutions to urban living in Finland is the Arabianranta project. The idea is based on research on planning and construction for new solutions. It is an example called ‘an experimental approach to urban living’. New urban areas comprise of a great variety of elements and many functions: residential district, university

campus and home to a media and design cluster. It refers to the concept of city campus – the third- generation science parks and LivingLab as a new form of cooperation for business and the public sector. The land development process was initiated by the city who owned the land. The adoption of innovative approaches concerning for example apartment block production, art provision or network connections, was possible through traditional instruments provided by the local authority. These include landownership, planning monopoly, plot reservations regulations and criteria applied in competitive bidding. However, the project gained momentum with the idea of public-private partnership and signing a letter of intent between educational institutions, enterprises in the area and the city of Helsinki concerning creation of a leading hub of design industry in the Baltic context called Art and Design City Helsinki. This company operates as a marketing company for Arabianranta. In addition, service companies were jointly established by developers and housing companies in the area in order to manage the common infrastructure. (Kangasoja & Schulman 2007, p.17-19)

3. Spatial planning system

Sources of spatial planning law

The Finnish legislation concerning planning and land use was recently renewed in the year 2000. Currently the Land Use and Building Act (LUBA 132/1999) of 1999 which came into force on 1 January, 2000 (with later amendments) provides regulations for planning and building development. This Act repeals the Building Act (370/1958) issued on 16 August, 1958¹¹³. More detailed provisions concerning the planning, building development and use of land areas are issued in the Land Use and Building Decree (LUBD 895/1999) of 10 September, 1999, which came into force on 1 January, 2000.

Furthermore, the Ministry of the Environment issues the supplementing regulations and instructions, which are published in the National Building Code of Finland. The regulations included in the National Building Code of Finland are binding but the instructions are not binding. Every municipality must also have a building ordinance¹¹⁴. However, the building ordinance regulations are not applied in matters where a legally binding local master plan, local detailed plan or the Finnish Building Code provides otherwise. (LUBA §§ 2, 13, 14)

LUBA increased the power of the local authorities and put a greater impact on public participation and environment. Larsson (2006) stated that: *“Finland now reached a point where the emphasis of spatial planning is on economically and ecologically sound use of land, public participation, the protection and improvement of existing urban and rural environments, and nature conservation.”* According to Kurunmäki (2005, p.64) *“the*

¹¹³ For more information about the post-war development of the Finnish planning system see e.g. Kurunmäki (2005).

¹¹⁴ The building ordinance may contain different regulations for different areas of the local authority. These regulations are necessary for organized and appropriate building, taking cultural, ecological and scenic values into account, and for creating and maintaining a good living environment. The building ordinance regulations may concern construction sites, the size and location of buildings, a building's suitability for its surroundings, the method of construction, planting, fences and other constructions, management of the built environment, organization of water supply and drainage, definition of areas requiring planning, and other corresponding matters of local importance pertaining to building. (LUBA §14)

hierarchy of plans is mostly the same as in the 1958 Act, but the confirmation of plans has been shifted from the central state to the local government.”

Land use and building law is a part of a wider concept in Finland called the environmental law. Such a perception stresses the importance of the environmental questions in the country. The important milestones in the rise of emergence of environmental planning was the establishment of the Ministry of the Environment in 1983, as well as the addition of the concept of sustainability to the Building Act in 1990¹¹⁵. The concept of environmental law contains three other major sections, e.g. environmental protection law, nature conservation law and natural resources law. Environmental aspects are emphasised in LUBA: on all levels and in all types of plans, the environmental impacts of the implementation of plans has to be assessed (LUBA §§ 5, 9). The definition of environmental impact includes impact on nature, architecture, landscape as well as settlement structure (LUBA § 5). Thus, the understanding of the concept of the environment is very wide. Also orders on building or area protection concerning special cultural values in the built environment are possible on all levels of planning (regional, master and local detailed plan) (LUBA §§ 30, 41, 57). The other stressed objectives of land use planning is to promote a safe, healthy, pleasant, socially functional structure, protection of the beauty of the built environment, protection of the cultural and natural values, biological diversity, functionality of municipalities and cities, and favourable business conditions, services and traffic (LUBA § 5).

Hierarchy of the planning system

The spatial planning system in Finland is hierarchical with different levels of land use planning (Figure 1). However, planning is not obligatory at all levels. A plan drawn on more general lines guides the drawing of a more detailed plan but a more general plan is not valid in an area with a more detailed plan. The plan is presented on a map (with an exception to planning at the national level). The plan includes a key to the symbols used and written regulations¹¹⁶.

¹¹⁵ In Finland three main strands concerning spatial policy fields namely are: land use planning, environmental policies, and regional development policies, which evolved relatively independently from each other, both in terms of their institutional set-up, and also in terms of their conceptual and theoretical underpinnings. The barriers between interests and perspectives of these three fields are more related to the different professional and scientific backgrounds of the relevant fields of expertise than to their institutional settings. Therefore, the three different professions and sciences were involved in different policy fields: architecture in land use planning, biology/ ecology in environmental policies and economics/ geography in regional development policies. In the 1980's and 1990's all these strands mentioned above underwent major transformations, opening the way for an increased doctrinal and institutional integration. The EU membership and the concept of ESDP process facilitated also the process of integration of the three policy fields. However, one can still sense cultural barriers between interests and perspectives of land-use planning, environmental policy, and local and regional development. There is very recently that architectural and environmental concerns on the one hand and economic concerns on the other, seen as inherently inconsistent by many experts and politicians. (Eskelinen *et al.* 2000)

¹¹⁶ The plan also includes a report which provides the information required for assessing the goals and options of the plan and their impacts, and the justification for the approaches adopted, as provided in more detail by decree. However, the report is not binding. (LUBA §§ 29, 40, 55)

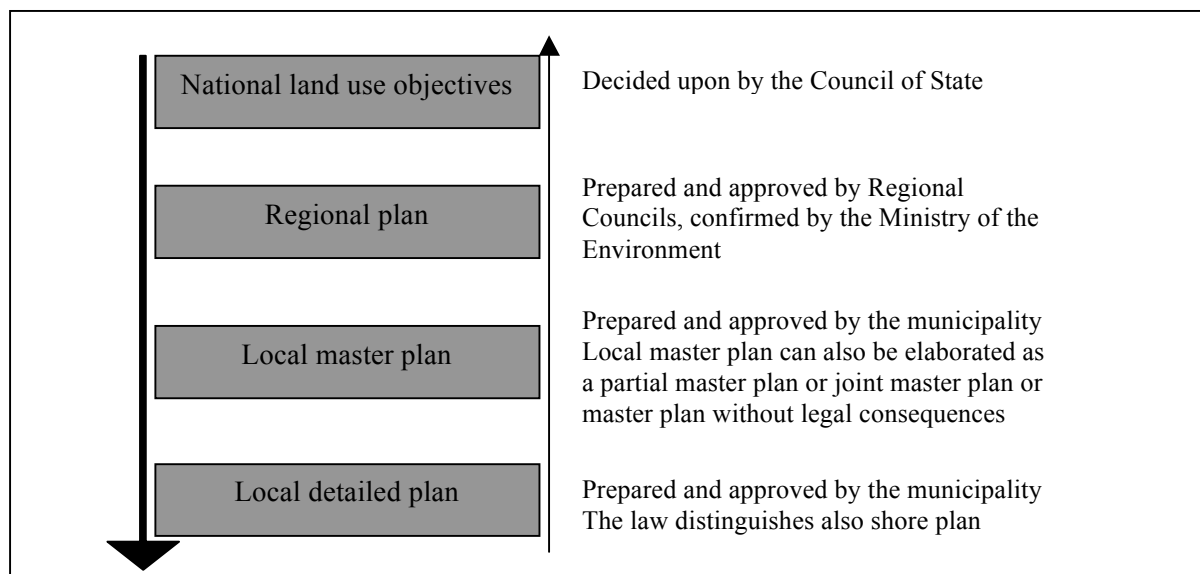


Figure 16. Different levels of land use plans in Finland

Government authorities must take national land use objectives into account, promote their implementation and assess the impact of their actions on local structure and land use (LUBA § 24). In regional and other land use planning, national land use objectives must be taken into account in a way that promotes their implementation. Section 32 of LUBA concerning the regional plan's legal consequences for other planning and authorities' activities states that:

“The regional plan shall be used as a guideline in drawing up and amending local master plans and local detailed plans, and when any other measures are taken to organize land use.

When planning measures concerning land use and deciding on their implementation, authorities shall take the regional plan into account, seek to promote implementation of the plan and ensure that taking the measures does not hinder the plan's implementation.

The regional plan is not valid in areas where a legally binding local master plan or local detailed plan is in force, except concerning amendment as referred to in paragraph 1”.

In turn, Section 42 of LUBA defines the local master plan's legal consequences for other planning and authorities' activities and states:

“The local master plan shall be used as a guideline in drawing up and amending local detailed plans, and when any other measures are taken to organize land use.

When planning measures concerning land use and deciding on their implementation, authorities shall ensure that taking measures will not hinder the plan's implementation. The local master plan replaces any previously approved local master plan for the same area, unless otherwise stipulated in the plan.

The local master plan is not valid in areas where a local detailed plan is in force, except when concerning amendments of the detailed plan as referred to in paragraph 1.”

National level

At the national level, land use objectives of national significance are decided (also called the national land use guidelines) (LUBA §22). There is no national spatial plan. On 30.11.2000, the Finnish Council of State set the first national land use guidelines. The national land use guidelines indicate which issues should be taken into account all over the country in all land use and land use planning. (Finland's National Land Use Guidelines)

The Ministry of Environment (ympäristöministeriö) is the competent ministry, which is drafting the national land policy, including the environmental protection, land use, housing and building and it is in charge of drafting national land use objectives. There are 13 regional environmental centres in Finland, which are decentralised arms of the Ministry of Environment (Land use and building). In relation to spatial planning, the Ministry of Environment is responsible for the preparation of national legislation, EU issues, national guidelines, promoting research, training, educational pilot projects, producing publications and other means of information dissemination. (Ministry of the Environment)

National land use objectives may concern matters which have: 1) international or more extensive than regional bearing on local structure, land use, or the transport or power network; 2) a significant impact on national cultural or natural heritage; or 3) nationally significant impact on ecological sustainability, the economy of the local structure, or avoidance of environmental hazards (LUBA §22). National land use objectives are drafted in collaboration with other ministries, regional councils and other authorities and parties whom the matters concern (LUBA §23). The Ministry of Environment elaborated also on non-binding strategies, principles for national spatial development (i.e., Finland 2017, Spatial Structure and Land-Use Vision or National Urban Strategy FE31en/ 2006, Competitiveness, well-being and eco-efficiency). Besides the environmental question, the policy of welfare state is still expressed in documents elaborated at the national level.¹¹⁷

Regional level

The regional level of planning includes the regional scheme, the regional plan, which steers other land use planning, and the regional development programme. National land use

¹¹⁷ Finland is one of the strongholds of the so-called Nordic welfare regime, the country of the most equal income distributions in the Western world and a relatively low poverty rate (Vaattovata & Kortteinen 2003). In local urban and housing policies, the national policy of welfare state is expressed by a long tradition of social mixing. The result is seen in development of heterogeneous and socially balanced neighbourhoods. This was especially true in the Helsinki area. During the past decade Finland has undergone a change to become one of world's leading information societies. Recently however it seems that the economic growth based on ICT technology and a globalised economy, or information economy, also started to breed urban inequalities in Finland even in political conditions specifically designated to prevent this from happening (Vaattovata & Kortteinen 2003).

objectives must be taken into account in drawing up regional plans (LUBA §28). The regional plans are drafted by the Regional Council, which consists of municipal representatives in the county (LUBA §26). The regional scheme indicates the regional development goals. The regional plan sets out the principles of land use and community structure, and designates areas as necessary for regional development. Areas are designated as reserved only to the extent and accuracy required by national or regional land use goals or by harmonizing the use of land in more than one municipality. (LUBA §25)

Local level

On the local municipality level, land use is organised and steered by two main plans: the local master plan (yleiskaava) and the local detailed plan (asemakaava) (LUBA § 4). In some situations when the general guidance of land use so requires, the local authorities also may cooperate in drawing up the joint master plan (LUBA § 4). The local master plan may also be drawn up in stages or by sub-areas, so-called the partial master plan (LUBA §35). There are also two execution plans (the plot division plan (LUBA § 78) and the street plan). Besides these plans a local authority must have a local building ordinance, which gives detailed guidelines and regulations for building in the municipality (LUBA § 14). In addition the Finnish planning system recognises a detailed shore plan (LUBA § 74).

In this study the focus is on the rules of land-use planning applied at the local level. The power of higher-level authorities is not a topic of this research and it is mentioned only as a reference point for the actions of local authorities.

4. Planning at the local level

Local master plan

Local master plans identify the general spatial framework and criteria for land use over an area and shall be further used as a guideline for a local detailed plan. The local master plan may issue the necessary protection regulations for an area or building requiring protection due to its landscape, natural values, built environment, cultural and historical values or other special environmental values (LUBA § 41). These areas must be designated for such protection in the plan.

The local master plan may be legally binding or not (LUBA § 45). The legal effects of the local master plan directed towards the landowners include restrictions on building and other actions in these special protection areas designated in the plan. A building permit in general cannot be issued in contradiction to the plan. Section 43 of LUBA states that a building permit may not be granted if it hinders the implementation of the local master plan. The permit shall be granted if, however, its denial on the basis of the local master plan would cause substantial harm to the applicant and the local authority or, when the area should be considered reserved for its needs, some other public entity does not expropriate the area or does not provide reasonable compensation for the said harm. This rule is called “the money or permit” principle, i.e. if the local authority does not expropriate area or provide compensation, and the building restrictions causes the landowner significant harm, then the building permit

must be granted (Nuuja & Viitanen 2007). However, it is important to emphasise that if the restrictions provided by the local master plan do not affect the “normal, reasonable and sensible use” of the property and are fulfilling the criteria to be general and non-discriminative, i.e. the so-called principle of social obligation, they are not compensated (Nuuja & Viitanen 2007). It means that the landowner must tolerate some restrictions based on a public need.

The local master plan may also be drawn up and approved so that it lacks the legal consequences with regard to its entire area or a part thereof. However, the provisions concerning expropriation apply to such local master plans. (LUBA § 45)

In summary the local master plan -

- covers usually the urbanised part of the town area and in some cases the entire area
- provides general guidance regarding the community structure and land use of a municipality or a part thereof (LUBA § 35)
- presents the principles of targeted development and indicates the areas required as a foundation for detail planning, other planning and building, and other land use (LUBA § 35). The local master plan may determine for example the location of hypermarkets in order to keep inner cities lively and prevent urban sprawl
- must take into account the functionality, economy and ecological sustainability of the community structure, utilisation of the existing community structure, housing needs and availability of services, opportunities to organise traffic and public transport, energy, water supply and drainage, waste management, opportunities for a safe and healthy living environment, business conditions within the municipality, reduction of environmental hazards, protection of the built environment, landscape and natural values and a sufficient number of areas suitable for recreation (LUBA § 39)
- shall not cause unreasonable harm to landowners or other titleholders (LUBA § 43)
- is presented on a map or maps of a scale that allows the principles of land use, necessary areas and other plan content to be indicated in an appropriate manner taking into account the need to steer land use and building, and the purpose of the local master plan (LUBA § 40)
- must be drawn up and kept up-to date by the local authority (LUBA § 36)
- can be legally binding or not (LUBA § 45)
- is approved by the municipal council (LUBA § 37)

The local master plans are usually financed by the municipality. However, the planning work is encouraged and supported also by the Ministry of the Environment. (Viitanen *et al.* 2003)

In practise, for example in Helsinki, master planning is under continuous evaluation and review because every new city council becomes strongly involved in goal setting and implementation. In Helsinki a Strategic Planning Advice, a land-use plan and an implementation schedule were recently elaborated. (Larsson 2006, p.137)

It should be emphasised that it happened especially in the cities that before the elaboration of the local detailed plan the more detailed master plan for the area in question is prepared (partial master plan) (LUBA § 35). The regulations and procedures are the same as it is in the case of the master plan covering the area of the whole city. In addition municipalities in

Finland can also prepare the joint master plan for the purpose to promote the inter-municipal spatial policies (LUBA § 46).

It should also be emphasised that the local master plan is not an obligatory instrument. In practice the local detailed plan has also been drafted without a master plan covering the plan area. For the local master plan there are no regulations concerning the validity of the plan.

According to Viitanen *et al.* (2003, p. 56) the average age of the local master plan is about 5 to 10 years. There are local master plans for 97 % of the municipalities. About 20% of the plans (7% of the total land area) had legally binding provisions and the number of local master plans with legally binding regulations is increasing.

Local detailed plan

In general, the local master plan is implemented by the local detailed plans that are legally binding. A legal effect of the local detailed plan means the restrictions on the use of the area in the plan. The buildings may not be built in violation of the local detailed plan and the detailed plan shall be taken into account with regard to other measures altering the environment (LUBA § 58). Functions that hinder the use designated for other areas or are in conflict with regulations issued in the local detailed plan concerning the prevention or restrictions of harmful or disturbing environmental impacts may not be located in the local detailed plan area (LUBA § 58).

The local detailed plan is drawn up for the purpose of detailed organization of land use, building and development, with the aim of designating areas necessary for different purposes and of steering building and other land use, as required by local conditions, townscape and landscape, good building practice, promoting the use of existing building stock and other steering goals of the plan (LUBA § 50). Therefore, with the local detailed plan the local council decides on rather detailed regulations about the location and height of the buildings, building density, maximum numbers of storeys, construction materials, facades, roofs, parings, planting, etc. (LUBA § 54).

In the local detailed plan, an area within a building block is divided into plots¹¹⁸ if necessary to arrange for land use (*plot division*). The plot division may be binding or indicative. When the central location of the area, the building density of the block or the explicitness of the land administration system so require, the plot division shall be made binding. Therefore normally in the city areas, a binding plot division is required. The division is indicated on the map of the local detailed plan. If it is not prescribed as binding, it is indicative. After the plot division map is approved all plots have to be entered into the Real Estate Register. This is required when applying for a building permit. (LUBA §§ 78-79, 81)

¹¹⁸ The term 'plot' is used in legislation with two different meanings that should be clarified. Firstly, Finnish legislation defines 'plot' in relation to units of plot division in the local detailed plans (so-called *plan plot*). (LUBA § 78). Second, 'plot' refers to a real estate formed in accordance with a binding plot division and entered into the Real Estate Register as a plot (so-called *register plot*). (The Real Estate Formation Act 554/1995 section 2.1:3). The term *Building site in a local detailed plan* refers to an area to be developed as defined in the local detailed plan, when there is no binding plot division (The Real Estate Formation Act section 62).

The local detailed plan in summary -

- is drawn up for the purpose of detailed organisation of land use, building and development, with the aim of designating areas necessary for different purposes and of steering building and other land use, as required by local conditions, townscape and landscape, good building practice, promoting the use of existing building stock and other steering goals of the plan (LUBA § 50)
- must be drawn up and kept up-to-date as required by development of the municipality or by the need to steer land use (LUBA § 51)
- when the local detailed plan is drafted, the regional plan and the legally binding local master plan must be taken into account (LUBA § 54)
- is approved by the local council or in cases when the plan does not have significant impact, the municipal board or a committee (LUBA § 52)
- shall be drawn up so as to create the preconditions for a healthy, safe and pleasant living environment, locally available services and the organization of traffic. The built and the natural environment must be preserved and their special values must not be destroyed. There must be sufficient parks or other areas suitable for local recreation in the area covered by the plan (LUBA § 54)
- must not substantially weaken the quality of anyone's living environment in a manner that is not justified by the plan's purpose (LUBA § 54)
- is presented on a map indicating: the boundaries of the area covered by the local detailed plan, the boundaries of the various areas, public and private uses, the volume of building rights and the principles governing the sitting of buildings and when necessary, the type of construction (LUBA § 55)
- is always legally binding
- enables the most detailed protection regulations
- can concern the prevention or limitation of harmful environmental impacts, and the type and size of a retail shop, if necessary to ensure the availability of retail services, also special protection regulations concerning landscape, natural values, built environment, cultural and historical values (a large retail unit may not be located outside the area designated in the regional plan or the local master plan for central functions, unless the area is specifically designated for such a purpose in the local detailed plan (LUBA § 58). A large retail unit refers to retail shops larger than 2,000 m² in gross floor area, with an exception to trading in special goods that require a great deal of space (LUBA § 114))
- is a responsibility of the municipality, however special shoreline plans can be prepared by the landowner but still has to be approved by the municipal authorities

The local detailed plans must be kept up-to-date by the local authority. In the case of the local detailed plan, the period of validity of the plan (when the plan can be in force) is usually 13 years. When special cause exists, the 13-year period may be changed to range from 5 to 20 years. This has important implications for building permits, which may not be granted after the period of validity. After the period of validity, the local authority has to assess whether the plan is up-to-date or not. The decision concerning the period of validity may not be appealed. When the municipality decides that the plan is outdated the building permit may not be granted and a building prohibition for the purpose of amending the local detailed plan comes into force. (LUBA §§ 60-61)

The local detailed plans cover about 5,200 km² in 98 % of the municipalities, which is less than 2 % of the total area of the country (Viitanen *et al.* 2003). Otherwise it varies a lot in different parts of Finland.

Planning process

According to the provision of law, the planning procedure has to be organised in such a way that all interested parties have an opportunity to participate in preparing the plan, estimating its impact and state their opinion on it, in writing or orally (LUBA §§ 15, 62). When the plan is drawn up special meetings with interested parties may be organized, where the material used in plan preparation is available and interested parties have an opportunity to provide their opinion (LUBD §30).

Section 63 of LUBA states:

“When a plan is being drawn up, a scheme covering participation and interaction procedures and assessment of the plan's impact must be drawn up in good time, as required by the purpose and the significance of the plan.

The initiation of the planning process must be publicized so that interested parties have the opportunity to obtain information on the principles of the planning and of the participation and assessment procedure. Such publicity must be arranged in a manner appropriate to the purpose and significance of the plan. The publicity may also take place in connection with the publication of a planning review.”

The local authority may negotiate with the regional environmental centre on the adequacy and implementation of the participation and assessment scheme. Before the plan proposal is made available to the public, interested parties have the opportunity to propose negotiations to the regional environmental centre on the adequacy of the participation and assessment scheme. If the scheme is clearly inadequate, the regional environmental centre shall, without delay, arrange negotiations with the local authority to examine what additions are required. The interested party making the proposal and, as necessary, authorities and organizations whose sphere of activities the matter concerns, shall be invited to attend the negotiations. (LUBA § 64)

The planning proposal is placed for public display for a period of at least 30 days (LUBA § 65, LUBD §§ 19, 27). Local residences have the possibility to present their opinion and objections within the proposal's availability period (LUBA § 65, LUBD §§ 19, 27). The local authority's reasoned opinion on the objection shall be made known to objectors who have so requested in writing and, at the same time, provided their address (LUBA § 65). The decision to approve a plan must be sent immediately to those members of the municipality and objectors who so requested (LUBA § 67).

Participation of the public in planning procedures concerns all plans. Therefore, also both local plans included in the research: the local master plan and the local detailed plan are the subject of public participation. In addition also the street plans are the subject of public display and discussion. The same procedure is also applied when the plan is amended.

Larsson (2006, p.139) numerated the following main phases in the production of the local master plan:

1. *“The municipal executive board initiates the preparation of the plan. The draft is made by the local planning office or a private consultant. The draft must include a description of the likely environmental impacts of implementing the plan.*
2. *Consultation takes place with the regional council, neighbouring municipalities and, if necessary, with the State and interest group*
3. *An opportunity is given with two public displays to landowners, organisations and the public to express their opinions. The draft must go through the public hearing process before its content can be approved by the municipal council*
4. *At the same time, statutory statements to ensure that the plan is not in contradiction with other relevant plans, are asked from the regional council, neighbouring municipalities, government agencies, municipal committees and building permission authorities*
5. *The plan is approved by the municipal council”*

For the local detailed plan preparation Larsson (2006, p.139) distinguished the following stages:

1. *“The municipal executive board decides to start the process for an area*
2. *Involved landowners are notified*
3. *The municipal planning office or a private consultant makes a draft plan*
4. *The draft plan is put on public display together with the statement received from landowners and third parties during the consultation period*
5. *The municipal executive board accepts the draft, followed by a second public display*
6. *After the statement has been processed, the municipal council may approve the plan. ”*

In the case of the local detailed plan, all parties which could be affected by the plan are informed in writing that the plan proposal is made available in public (LUBD §27). This includes the local authorities, which border on the local detailed plan area, owners and titleholders known to the local authority of land within the area to be planned. After the approval, the approved plan is available to the public. The plan only comes into force when it has been made available to the public (LUBA §200).

Elaboration of the participation and assessment schemes and the display to the public of the draft plans are phases of the planning procedure which are required by law. In practice very often more open meetings are organised where the planning decisions, which progress in detail, are discussed in public. (Puhakka 2004)

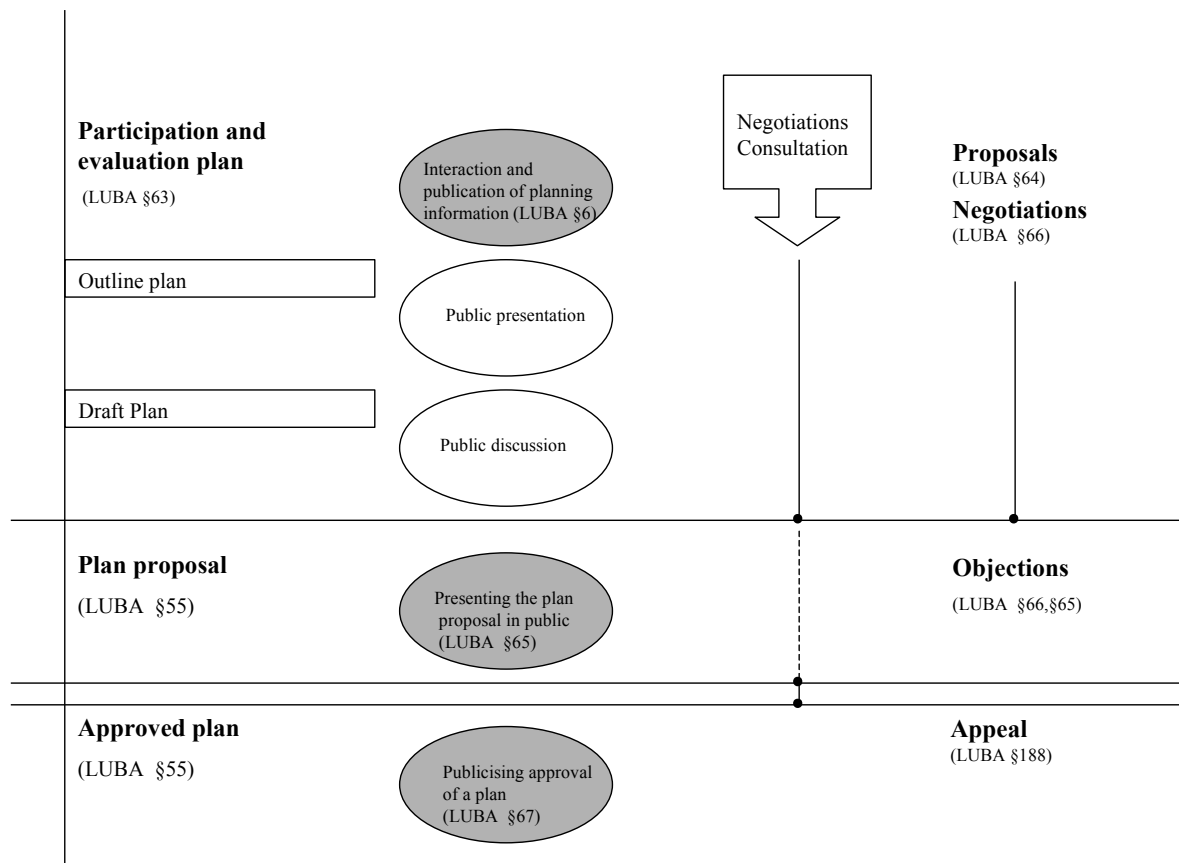


Figure 17. Procedure of the detailed plan preparation

The approval of the local master plan, the local detailed plan or a building ordinance can be appealed in an administrative court as laid down in the Local Government Act (LUBA §188). The appeal authority may make corrective adjustments to the land use plans (LUBA §203).

5. Planning monopoly

The local authority plays a dominant role in the process of planning and land development. As a rule Finnish municipalities have a so-called planning monopoly, which is understood in the way that they have rights to decide about content and areas covered by the local plans. The local authority shall see to the necessary drawing up of a local master plan and to keeping it up-to-date (LUBA § 36). The local master plan is approved by the local council (LUBA § 37). Section 52 of LUBA concerning approval of the local detailed plan provides that the local detailed plan is approved by the local council.

Possible interference by the state authority in the planning monopoly of the municipalities

Development negotiations

A municipality initiates and carries out the process of plan elaboration independently. Only consultations (negotiation) with regard to issues concerning the planning of land use and land development have to be conducted with the regional environmental centre, i.e. the state authority. Section 18 of LUBA explains the functions of the regional environmental centre:

“The regional environmental centre promotes and steers the organization of land use planning and building activity within the areas covered by a local authority.

The regional environmental centre must especially exercise control to ensure that national land use objectives, other goals pertaining to land use and building, and provisions concerning the management of planning matters and building activities are taken into account in planning, building and other land use, as provided in this Act.”.

At least once each year, the local authority and the regional environmental centre conduct development negotiations on issues concerning the planning of land use and land development within the local authority's territory, important planning matters that are or will in the near future become pending (LUBA § 8).

In addition section 66 of LUBA concerning negotiations between authorities states:

“When the regional plan is being drafted there shall be contact with the competent ministry and the regional environmental centre. Negotiations shall be set up between the competent ministry, the regional environmental centre and the regional council to clarify how national objectives and other key goals pertain to drawing up of the plan.

Other plans which concern national or important regional land use objectives, or which are otherwise important in terms of land use, natural values, cultural environment or government authorities' implementing obligations shall be prepared in contact with the regional environmental centre. Negotiations shall be set up between the regional environment council and the local authority to clarify how national objectives and regional and other key goals pertain to drawing up such a plan.

The authorities whose sphere of activity the matter may concern shall be invited to the negotiations referred to in paragraphs 1 and 2 above.”

In addition according to law in Finland, a municipality or a regional council whose territory is affected by the material impact of a local master plan or a local detailed plan must be involved to a sufficient degree in investigating the impact of the plan¹¹⁹. Negotiations between the authorities are set up when planning begins and after a plan proposal has been available to the public and comments and opinions concerning it have been received. The local authority shall agree with the regional environmental centre on setting up the negotiations, and

¹¹⁹ For instance the Ministry of the Environment is invited to negotiations that concern key issues related to large urban areas

provide the material needed for them. Therefore the authorities whose sphere of activity the matter may concern are invited to the negotiations, but the authority does not approve the plan proposal¹²⁰. Members of the municipalities and other interested parties are entitled to enter objections to the plan proposal. (LUBD, §§ 1, 18, 19, 20, 26)

Written rectification reminder

The regional environmental centre has a right to issue a written rectification reminder to a local authority after the authority has approved a local master plan or a local detailed plan if the plan has been drawn up without taking national land use objectives into account or otherwise in contravention of the law, and it is in the interest of the public good that the question is placed before the local authority for a new decision. (LUBA § 195)

When a rectification reminder has been issued, the municipal council shall decide upon the land use plan. If the council does not make the decision within six months of the reminder, the decision to approve the plan shall be deemed void (LUBA § 195). The new decision upon the land use plan, however, can be exactly like the old one. In this case the regional environmental centre can make an appeal to the administrative court. The content of the plan, however, is in the municipality hands. The court cannot change the content of the plan. The court can only accept or cancel the plan or part of it.

Any appeal should be based on an administrative error or inconsistency with law. It means a decision taken by the municipality can be appealed on the grounds that: it was not taken in the proper order; the authority taking the decision exceeded its authority; or the decision is otherwise illegal (The Finnish Local Government Act, section 90).

Order for the enforcement of planning duties

In addition, if the municipality does not fulfil its planning duties, it means it does not draw up a building ordinance, or the necessary local master plans or local detailed plans, or keep them up-to-date, it is evident that the municipality impedes the attainment of goals set in legislation for land use planning and for the steering of building. In this case the Ministry of Environment, after the negotiations with the municipality may issue an order on drawing up or amending a local detailed plan or the local master plan within a specified period (order for the enforcement of planning duties or order for the purpose of attaining a national land use objective). The ministry may also impose a conditional fine requiring the local authority to

¹²⁰ An opinion on a local master plan proposal is requested from: 1) the regional council; 2) the local authority whose areas the plan affects; and 3) the regional environmental centre and authorities and organizations important in terms of the regional plan, as necessary. An opinion on a local detailed plan proposal shall be requested from: 1) the regional council if the plan concerns issues addressed in the regional plan or which are otherwise regionally significant; 2) the regional environmental centre if the plan concerns national land use objectives, an area or feature significant in terms of nature or building conservation, or an area reserved in the regional plan for recreation or conservation; 3) local authorities whose areas the plan affects; and 4) other authorities whose sphere of activities the plan concerns and organizations important in terms of the plan, as necessary. (LUBD, §§ 20, 28)

observe the order. Section 177 of LUBA concerning an order for the enforcement of planning duties states:

“ If the local authority does not draw up a building ordinance, the necessary local master plans or local detailed plans, or keep them up-to-date, and it is evident that it impedes the attainment of goals set in legislation for land use planning and for the steering of building, the competent ministry may issue an order that a decision concerning it shall be made within a specified period.

Negotiations shall be conducted with the local authority before the order referred to in paragraph 1 is issued. The local authority must also be requested to provide an opinion.

If the order referred to in paragraph 1 is not observed, the ministry may impose a conditional fine requiring the local authority to observe the order.

What is provided above in this section concerning local authorities correspondingly applies to regional councils that do not draw up necessary regional plans or keep them up-to-date.”

Section 178 of LUBA concerning order for the purpose of attaining a national land use objective states:

“If, in the interest of the public good, it is vital that conditions are created for particular use of an area in order to attain a national land use objective, and no solution is provided in the regional plan or the local master plan or the local detailed plan, the competent ministry may issue the regional council or the local authority with pertinent orders concerning planning of the area.

Negotiations shall be conducted with the regional council, the local authority and other parties affected by the matter before the order referred to in paragraph 1 is issued. Opinions shall also be requested from said bodies and parties.”

These are the state authority instruments which interfere in the municipal planning monopoly according to the provision of law. Some argue that in practise they have never been used, (Viitanen 2009). The state has no power to draft or to adopt the land-use plan instead of municipalities. The state has also no power to change the content of the plan.

The relationship between the municipality and private landowners and developers in the initiating of the planning process

Local residents' right to submit initiatives to the local authority in matters related to its operations

In Finland the residents of a municipality have the right to make a proposal to initiate a planning process. In general local residents have the right to submit initiatives to the local authority in matters related to its operations. Persons submitting initiatives shall be informed of action taken as a result of an initiative. In addition, if the persons submitting an initiative

on a matter within the purview of the council represent at least two per cent of the local residents entitled to vote, the matter shall be considered by the council not later than six months after the matter is instituted. (The Finnish Local Government Act, 365/1995, § 28)

However, planning monopoly belongs to the municipality and the municipality can refuse to start the planning process.

Landowner's right to draw up the detailed shore plan

In Finland, there are special provisions concerning shore areas. In shore areas landowners have a right to draw up a proposal of a detailed shore plan. Therefore landowners may take charge of drawing up a proposal for the detailed shore plan of the shore areas they own. Before the process begins, the local authority must be contacted and provided with a participation and assessment scheme. The area of a detailed shore plan drawn up by the landowner must form a functional whole. The provisions concerning planning procedure and interaction otherwise apply to the processing of a local detailed plan proposal drawn up by a landowner. (LUBA § 74)

However, even if private landowners would deliver the shore plan proposal, the municipality can still refuse to adopt the plan.

Land use agreements

Landowners as well as developers can also start negotiations concerning the development of an area and sign a land use agreement with the municipality. However, the planning monopoly belongs to the municipalities and municipalities can refuse to start the planning or development process of their areas. Land use agreements may be used to agree on development compensation and other mutual rights and obligations of the parties to the agreement (LUBA § 91b).

The land use and development agreements were not mentioned in the legislation before 2000 although they have been usual. Kurunmäki (2005, p.85) summarizes the situation concerning the introduction of the contract principle:

“The need to collect public and private resources for the implementation of plans was emphasised in Finland during the law renewal process in the 1990s. Planning experts saw the development of contractual mechanisms as the general solution to secure implementation (...) The content of discussion concerning contracts was, on the one hand, often very regulative, connected to the problem of how to get the private sector to pay part of the infrastructure costs, or how to deal with the unearned increase in the value of private land and other properties (so called betterment)”

LUBA of 1999 had only one section about land use agreement. Initially, LUBA allowed the making of binding land use agreements already before the initiation of the official planning process with participatory procedures. The Act was found to contradict its general objective of safeguarding public participation in planning (Mäkinen, 2000). In 2003 the whole new

Chapter 12a (Sections 91a - 91m) were added to LUBA concerning land use agreements. The act denies the making of binding land use agreements before the final stages of the planning process. Preliminary agreements were allowed concerning the decision to begin the planning process and the rights and duties of the parties involved. More specific rules on the informing of the land use agreements in the beginning and during the official planning procedure were also given. The law states that the land use agreements made by a local authority regarding planning and the implementation of plans shall not override the objectives and content requirements of planning laid down in the planning law. It is important to emphasise, that it is not possible to make a land use agreement binding concerning the content of the plan. A land use agreement binding both parties can be made only after the plan draft has been publicly displayed. This does not apply to agreements that concern starting the planning process. (LUBA § 91a)

According to the provision of LUBA the private developer may finance the detail plan preparation and participate actively in the plan preparation. Land development contracts usually involved the active cooperation of the land owners or the private developers in the land use planning process. Figure 4 presents an example of practice of the process of an active cooperation in planning. The right column presents the phases of a local detailed plan elaboration. The left column expresses the progress in the process of negotiations.

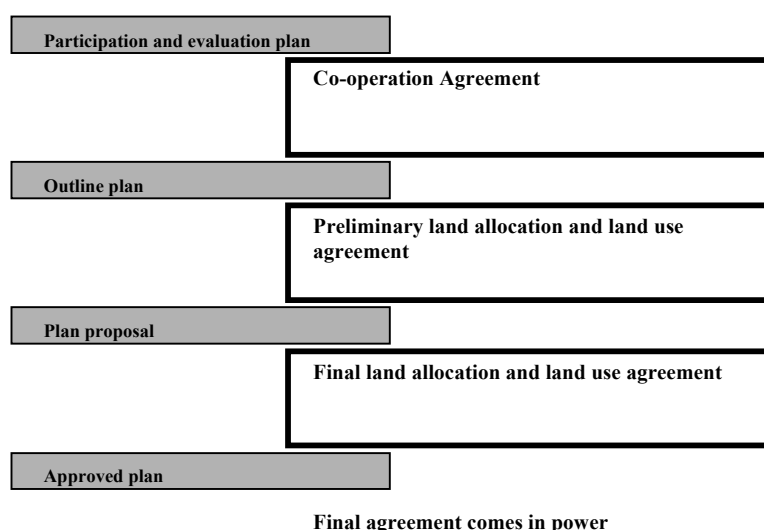


Figure 18. Public-Private Partnership in Local Detailed Planning

The law states that in the land use agreement, the rights and obligations of the parties can be defined more widely than the provisions in the chapter concerning development compensation stipulate (LUBA § 91b). It means that it can contain also other arrangements for co-operation, also in planning.

Section 91b of LUBA concerning land use agreements states:

“A local authority may enter into agreements on planning and implementing plans (land use agreement). However, land use agreements cannot be binding on the content of plans.

A land use agreement that is binding on the parties to the agreement can be made only after the draft plan or proposal has been publicized. This does not apply to agreements to initiate planning.

Notwithstanding the provisions of this chapter on development compensation, land use agreements may be used to agree more comprehensively on the mutual rights and obligations of the parties to the agreement.

A land use agreement shall be publicized in conjunction with drawing up the plan. The intention to agree on land use must be publicized in the participation and assessment scheme. If the intention to agree on land use becomes known only after the participation and assessment scheme has been drawn up, it must be publicized in conjunction with the drawing up of the plan in a manner that best serves the purpose of informing interested parties.”

The legitimacy of early (preliminary) agreements between developer and municipalities and decisions on the contents of the plans, may be however questioned, in the later stage of public participation. Tensions between preliminary agreements and schemes on the one hand, and public inclusiveness and accountability, on the other hand, were studied by Mäntysalo & Saglie (2009)¹²¹.

The cost of drawing up a local detailed plan

In general, the costs of local plans are covered by the municipality. However, there is an exception to this rule.

When the local detailed plan or an amendment to it is mainly required by private interests and drawn up on the initiative of the landowner or other titleholder, the local authority is entitled to charge the costs incurred in drawing up and processing the plan to the landowner or titleholder concerned (LUBA § 59).

In the case of shore areas, when a local master plan is drawn up for shore areas for the principal purpose of arranging for holiday homes, no more than half of the costs of drawing up the plan can be charged to the landowners in relation to the benefit they gain from the plan. The local authority approves the basis for the charge, which is collected in the plan area, and the manner and date of payment. (LUBA § 76)

6. Consequences of the adoption of the local detailed plan

Consequences are understood as monetary (financial) and other kinds of consequences, including for example land transfers.

¹²¹ See also Mäntysalo (1999)

Development compensations

In Finland, planning charges on the increment in land value due to the approval of the local detailed plan was not mentioned in the planning legislation before 2003. But it was often practiced that municipalities collected this kind of payment on the basis of civil law agreements.

According to articles of LUBA added in 2003 a landowner who gains a remarkable profit of a detailed plan may be obligated to pay compensation for the infrastructure to the municipality. Section 91a of LUBA concerning a landowners' duty to share in the costs of community building states:

“A landowner in an area for which a local detailed plan is to be drawn up who stands to gain substantial benefit from the plan is obliged to share in the costs incurred by the local authority from community building as laid down below. Agreement should be reached with the landowner on sharing in the costs. Landowners shall be treated equally with regard to fulfilling the obligation.”

Thus the landowner who gains significant benefit from the plan, is obliged to take part, in the manner regulated by LUBA, in paying the infrastructural cost (the costs of community building) that occur in the municipality. First, this participation should be attempted to be realised through an agreement. Therefore the municipality can make agreements concerning planning and plan implementation (land use agreement). (LUBA § 91c)

If no agreement has been reached with the landowner on his or her participation to the costs of infrastructure building, the municipality can oblige the landowner to pay a part of the costs of the infrastructure (which serves the said plan area), which is proportioned to the value increase of the plot caused by allocated building rights in the local detailed plan, an increase of building rights in the local detailed plan or a change of the purpose of use. This is called in LUBA development compensation. (LUBA § 91c)

Section 91 c of LUBA concerning development compensation provides:

“When an agreement is not reached with landowners concerning their sharing in the costs of community building, the local authority may collect from the landowners a share of the estimated costs of community building that contribute to the development of the plan area relative to the increase in plot value brought about by the building rights, increase in building rights or change of permissible use based on the local detailed plan (development compensation).”

Increase in plot value is assessed by applying, as appropriate, the provisions on grounds for compensation in the Act on Expropriation of Immovable Property and Special Rights (603/1977), hereinafter the Expropriation Act.

The value of street areas transferred without compensation under section 104 and the street area compensation collected from landowners under section 105 are deducted from the development compensation.

When the building rights assigned by the local detailed plan concern only housing and the amount of building rights or increase in building rights do not exceed 500 m² in gross floor area, the landowner concerned cannot be required to pay development compensation. Other landowners may be required to pay development compensation if the local detailed plan brings substantial benefit as referred to in section 91 a. Local authorities may establish a higher minimum to apply in their municipality or in a particular plan area.”

Therefore development compensation cannot be allocated to a landowner, whose areas in the local detailed plan are only indicated to be used for residential building and the building right or its increase is less than 500 floor sq m. (LUBA § 91c). The maximum 60 % of the plot value increase caused by the local detailed plan can be collected as development compensation. However, the municipal council can also decide upon a lower percentage for the municipality or plan area. The municipality may also decide on not imposing the development compensation. The decision must be made without delay after the local detailed plan has been approved. The decision must include grounds for imposing the development compensation (LUBA § 91f).

When assessing the increase in the value of the plot, the provisions concerning grounds for compensation in the Act on Expropriation of Immovable Property and Special Rights (603/1977, hereinafter the Expropriation Act) are followed, where applicable. The value of the street area which is given without compensation (LUBA § 104), as well as the compensation for street area paid by the landowner (LUBA § 105) are deducted from the development compensation. (LUBA § 91c)

The discussed costs incurred by the local authority from community building include:

- the acquisition, planning and construction costs of streets, parks and other public areas both in the plan area and outside it that substantially serve the plan area
- the costs incurred from acquiring land to build public buildings that substantially serve the plan area, relative to the benefit they bring to the plan area
- costs incurred by local authorities from soil improvement and from necessary noise abatement in the plan area and the costs incurred from planning that have not been collected (LUBA § 91d)

The costs referred to above shall include both the estimated costs of implementing the plan and the costs incurred by the local authority from measures taken in advance to implement the plan. Costs must be reasonable regarding the character of the area and the circumstances in it. When the costs of measures have been taken into account in development compensation the local authority must endeavour to carry out these measures within 10 years after the decision to collect the compensation has become legally valid. (LUBA § 91d)

The above-mentioned mechanisms concern the local detailed plan. In case of the local master plan and the regional plan there is no development charges mentioned in the legislation.

Transfer to the municipality street and public road areas

When the local detailed plan comes into force, the road area of an existing public road¹²² included in the plan area is transferred to the local authority's ownership without compensation (LUBA § 93).

In addition, when a local detailed plan is approved for an area for the first time, the local authority gains possession¹²³ of any street area not previously in its possession (LUBA § 94).

In the situation when the local detailed plan is approved for an area for the first time the landowner is obligated to transfer to the municipality the area needed for streets without compensation (LUBA §83). However, there is limitation to this rule. The area can be transferred without compensation if the area does not exceed 20% of the total land owned by the landowner in the local detailed plan area, or is not larger than the building volume permitted for the land remaining in his/her ownership¹²⁴. Land designated in the local detailed plan as agricultural, water and forestry areas are not included into calculation of the total land. In other cases than the coming into force the local detailed plan for the first time, the municipality must pay compensation for the street area to the landowner determined according to the provisions of the Expropriation Act. (LUBA §104)

In addition, if the landowner does not have to transfer a street area without receiving compensation as referred to above, or has to transfer a significantly smaller area, the local authority may set reasonable compensation to be paid by the landowner (compensation for a street area). (LUBA §105)

Compensation to landowners for land use restrictions included in the local plans

If the implementation of the local detailed plan or the local master plan causes special harm or losses to the landowner, the municipality (or the State, if the area is designated for the State) provides the compensation, provided that the harm is not considered to be insignificant. However, this provision does not mean that there is a general compensation for any limitations the plan might cause to the landowner. (LUBA §§ 101, 106)

¹²² Nowadays according to the Highway Act 503/2005 a road assigned for general traffic and maintained by the State is defined as a highway.

¹²³ The local authority gains possession of an area when construction commences or it is needed for some other use and partition to separate the area has been initiated, or when the local authority has paid compensation for the area if necessary. If a building with greater than minor value, or a valuable structure or piece of equipment is located in the area, or the area is necessary for their use, the local authority may not take possession of the land before agreement is reached on compensation or an expropriation procedure has been initiated. Once the expropriation procedure has been initiated, the local authority may take possession of land which will become part of a street area when the local detailed plan is amended. (LUBA § 95)

¹²⁴ Notwithstanding this provision, the local authority is obliged to pay the landowner compensation for the street area if, taking into account the total impact of the transfer and the plan on said landowner, transferral without compensation is, exceptionally, manifestly unreasonable. (LUBA §104.3)

Section 101 of LUBA states that when the local detailed plan or, the local master plan, designates land for a purpose other than private construction and the landowner cannot therefore use the area in a manner generating reasonable return, the local authority or, if the area is intended or designated in the plan for State needs, the State is required to expropriate the area or pay compensation for the harm. The benefit the landowner derives from the local master plan or detailed shore plan is taken into consideration in assessing reasonable gain.

Section 102 of LUBA states that the duty of the local authority or the State to expropriate or pay compensation as laid down in section 101 takes effect only after the landowner's application for an exemption to the restriction has been denied and the decision has gained legal force. The local authority and the State are released from their duty to expropriate or pay compensation when, due to an amendment of the local master plan or the local detailed plan, the area can be used for private purposes in a manner generating reasonable return and the matter concerning the duty to expropriate or pay compensation has not been resolved or gained legal force.

The content of the local detailed plan can be a subject of compensation if plans substantially weaken the quality of anyone's living environment in a manner that is not justified by the plan's purpose and that the plan imposes restrictions on or causes harm to landowners or titleholders that could be avoided without disregarding the objectives or requirements of the plan (LUBA §§ 28, 39). These apply for example according to Nuuja & Viitanen (2007) to the situations, where the traffic connections to a plot is cut off due to building of a street to a required height, or a park or recreational area is removed and this causes a decrease in property value.

The principles of compensation on land use restriction incorporated in LUBA are also explained in more detail below together with the compensation on expropriation and other land use restrictions.

7. Development control

The scope of development control

The development control in Finland is an administrative procedure based on a permit system. When the application for a building permit fulfils the obligations imposed by law, the permit must be granted. In principle, in Finland the local detailed plan controls building in dense settlements. The general role is that any significant development in urban areas requires a local detailed plan. Furthermore the construction process requires a building permit¹²⁵ (LUBA § 125). The role is also that buildings may not be built in violation of the local detailed plan (LUBA § 58). A building permit also may not be granted if it hinders implementation of the local master plan¹²⁶ (LUBA § 43).

¹²⁵ Other permits include, e.g. action permits, demolition permits or landscape-work permits

¹²⁶ There are exceptions described by LUBA § 43 when the permit shall be granted. This includes the situation that would cause substantial harm to the permit applicant and the local authority. It is a so-called money or permit principle.

Section 58 of LUBA concerning legal consequences of the local detailed plan states:

“Buildings may not be built in violation of the local detailed plan (building restriction). The local detailed plan shall be taken into account with regard to other measures altering the environment, as provided below.

Functions which hinder the use designated for other areas in the local detailed plan may not be located in the plan area. Moreover, functions which are in conflict with regulations issued in the local detailed plan concerning the prevention or restriction of harmful or disturbing environmental impacts may not be located in the local detailed plan area.

A large retail unit may not be located outside the area designated in the regional plan or the local master plan for central functions, unless the area is specifically designated for such a purpose in the local detailed plan. A large retail unit is defined in section 114.

When the timing of the local detailed plan's implementation so requires, the construction of a new building may be prohibited in the plan for a maximum of three years. When special cause exists, the local authority may extend the prohibition for a maximum period of three years at a time.”

When the local detailed plan is in force, the landowners, in order to start the construction of a building must apply for the building permit from the local building supervision authority. It is usually the Municipal Building Committee. The local building supervision authority supervises compliance with plans and process permits concerning building and other activities. Thus the local building supervision authority works within the scope of policies contained in the legally binding plans and regulations. If the legal preconditions exist the building permit must be granted. (LUBA §125, LUBD §4)

LUBA §113 defines building activities in the following way:

“A building construction is a construction, structure or installation which is fixed or intended to remain in one place, and which is intended for living, working, storage or some other use, and which, because of its attributes, requires supervision by the authorities for reasons of safety, health, the landscape, comfort and pleasantness, the environment or other reasons related to the objectives of this Act.

Lightweight structures of minor size or smallish installations shall not be considered buildings unless they have special impact on land use or the environment.”

A building permit is also necessary for repair and alteration work, especially if the work may affect the safety or health conditions of those using the building (LUBA §125). In cases of construction of structures and installations, that cannot be considered a building, such as masts, containers and smokestacks, etc. instead of a building permit, an action permit is applied (LUBA §126, LUBD §62). The law distinguishes also the demolition permit and permit for landscape work. However these are not required if there is a valid building permit, which requires the demolition of a building or the earth works (LUBA §§127-128).

The procedure for obtaining building permission

The local building supervision authority approves the building permit (LUBA §130). A titleholder of a plot or a tenant shall apply in writing to this authority. Applications shall include proof that the applicant is the titleholder of the building site, and the master drawings are signed by the designer. When it is required by law, the environmental impact assessment report should be included into the building permit application. In cases of an area important to nature conservation as referred to in the Nature Conservation Act also the opinion from the regional environmental centre is necessary. (LUBA §§130-133)

In summary the building permit application should comprise of for example:

- the master drawing (a site plan and floor plan, section and elevation drawings)
- an extract from the base map covering the area
- an extract from the local detailed plan when building in the local detailed plan area
- a Property Register extract
- a plot map, if needed
- the ground investigation report on the building site, if needed
- an account of the site's health effects and ground levels, and the type of foundation and any other measures required, if needed.
- a declaration that all or some of the neighbours are aware of the project, and an account of any position they have taken on the construction work, if possible (LUBD §49, LUBD §65)

All neighbours should be notified about the submission of the application in order to allow them at least seven days to enter objections. Also if it is necessary with regard to neighbours' interest, the information about the building permit application shall be displayed on the building site. (LUBA §133, LUBD §65)

According to LUBA § 135 in the detailed plan area, a building permit is granted under the following conditions:

- 1) *“the building project is in keeping with the valid local detailed plan*
- 2) *construction meets the requirements laid down in section 117 and other requirements prescribed in or under this Act*
- 3) *the building is appropriate for the location concerned*
- 4) *a serviceable access road to the building site exists or can be arranged*
- 5) *water supply and waste water management can be organized satisfactorily and without causing environmental harm, and*
- 6) *the building will not be located or constructed in a way that causes unwarranted harm to neighbours or hinders appropriate building on a neighbouring property”*

Requirements concerning construction in Section 117 of LUBA include a provision that a building must fit into the built environment and landscape, and must fulfil the requirements of beauty and proportion, structural strength and stability, fire safety, hygiene, health and environment, safety in use, noise abatement, and energy economy and insulation (essential technical requirements). (LUBD §50)

If all required conditions are fulfilled, the building permit must be issued. In practice the process of issuing the building permit often includes negotiations on for example the suitability of the project into its surroundings (Larsson 2006).

When a building permit is applied for in an area, which is covered by a nature conservation program, a landscape conservation program or otherwise protected under the Nature Conservation Act, the building application must be consulted with the regional environmental centre¹²⁷. (LUBD §60, LUBA §133)

The issue of the building permit has to be made public (LUBA § 142). The building permit is valid for three years. It means that construction should begin within this period. Law also specifies that the construction should be completed within five years after the building permit become legally valid. (LUBA § 143)

According to Finnish law, before the building permit becomes legally valid, the permit authority can grant a permit to carry out construction work or take other action completely or in part. This is called the right to commence (LUBA § 144). After the municipality issues the building permit, the owner or titleholder of a plot must appoint a site manager in charge of the construction work¹²⁸ and notify the local authority (LUBA §§ 122, 149). Then the construction process can begin. Building activities are also the subject of supervision by the local authority (LUBA §124). Construction process ends with a final inspection and approval for use (LUBA §§ 149, 153).

In cases where the commencement of the construction without the permit occurs the penalty for damaging the environment or committing a building violation in contravention with LUBA is applied. In this case the property is confiscated. (LUBA §185)

8. Development without plans

The general rule is that each significant development project in urban areas requires a local detailed plan. Development without a plan is a rare exception in urban areas. Viitanen *et al.* (2003 p.55)

A right to deviate from regulations under LUBA

When a special cause exists, the municipality or the regional environmental centre can grant a right to deviate. The municipality may grant the right to deviate from the provisions, regulations, prohibitions and other restrictions issued in or under LUBA concerning building and other action. The municipality may not, however, grant a right to deviate:

1) in cases where construction of a new building in a shore area where the local detailed plan or a legally binding local master plan is not in force;

¹²⁷ There are 13 regional environmental centres in Finland, which steers the organisation of land use planning. Especially exercise control to ensure that national land use objectives and other provisions concerning planning matters are taken into account

¹²⁸ Sometimes also specialist foremen shall be used.

- 2) in the case of greater than minor deviation from the gross floor area permitted in the local detailed plan;
- 3) in the case of deviation from a plan regulation on the conservation of a building; or
- 4) in the case of deviation from a building prohibition issued for the purpose of approving a local detailed plan. (LUBA § 171)

In these cases, the right to deviate may be granted by the regional environmental centre. A right to deviate as defined in section 171 of LUBA may not be granted concerning provisions on the landscape-work permit or the special conditions of a building permit in areas requiring planning. (LUBA § 171)

The municipality may grant a right to deviate means that there are so called ‘expediency consideration’ or ‘consideration of points of expediency’ (tarkoituksenmukaisuusharkinta) which allows refusing to grant a right to deviate.¹²⁹

Deviation shall not impede planning, the implementation of plans or other organization of land use, hinder attainment of the goals of nature conservation or hinder attainment of goals concerning the conservation of the built environment. In addition a right to deviate may not be granted if it leads to building with substantial impact or if it has other substantially harmful environmental or other impact. (LUBA § 172)

Before a matter concerning deviation is resolved, neighbours and others on whose life, work and other circumstances the project may have significant impact on shall be given the opportunity to make a written objection. The local authority shall notify neighbours and other aforementioned parties of applications at the applicant's expense. Before a matter concerning deviation is resolved, the opinion of the regional environmental centre, some other State authority or of the regional council must be obtained, if necessary, when the deviation has substantial bearing on their sphere of authority. When deviation has substantial bearing on land use in a neighbouring municipality, its opinion must also be obtained. However, an opinion shall always be requested from the regional environmental centre when deviation concerns: 1) areas covered by special national land use objectives; 2) areas important to nature conservation; 3) sites, buildings or areas important to the conservation of buildings; or 4) areas reserved in the regional plan for recreation or conservation purposes. (LUBA § 173)

In addition the law states that under the condition of deviation provided by LUBA the local building supervision authority may grant a building permission in the cases of minor deviation from provisions, regulations, prohibitions and other restrictions concerning building. In addition, minor deviation from the technical and corresponding requirements of a building requires that the deviation does not set aside the essential requirements of building. (LUBA § 175)

¹²⁹ Everywhere where it is written may (‘voi’ in Finnish) in LUBA there is the type of consideration of the points of expediency.

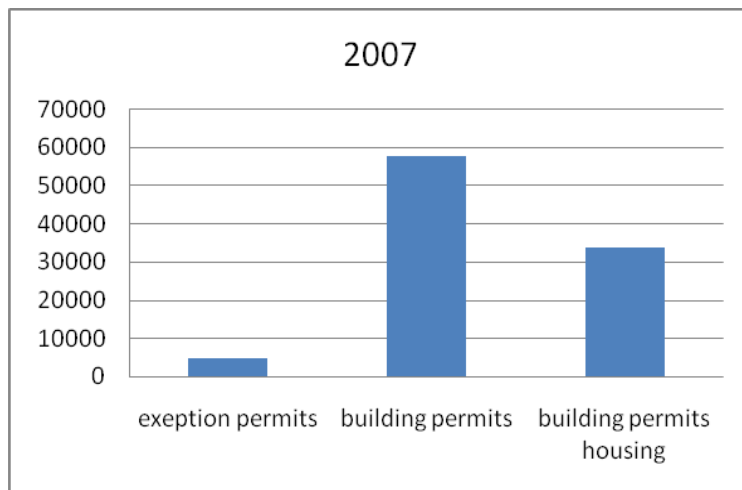


Figure 19. Number of building permissions versus exceptional permits in Finland in 2007. Source: Statistic Finland, Rakentamisen toimialakatsaus III/2007

The rules for development in the areas outside the areas covered by the local detailed plan

In local detailed plan areas, the suitability of a building site is resolved in the local detailed plan. In the areas outside the areas covered by the local detailed plan there are special requirements concerning development possibilities. The law states that if the suitability of a building site is not resolved in the local detailed plan the building sites must be appropriate for the purpose, fit for construction and sufficiently large, at least 2000 m². Buildings must also be located at a sufficient distance from a neighbour's land. (LUBA § 116)

Preconditions for a building permit outside local detailed plan areas in summary involve:

- the building sites must be appropriate for the purpose, fit for construction and sufficiently large, at least 2,000 m²
- when the appropriateness and fitness for purpose of a building site are considered, care must be taken to ensure that there is no danger from flood, earth or rock fall, or landslide
- it must be possible to locate buildings at a sufficient distance from the boundaries of the property, public roads and neighbouring land
- a building must fit into the built environment and landscape, and must fulfil the requirements of beauty and proportion. A building must meet the essential requirements for structural strength and stability, fire safety, hygiene, health and environment, safety in use, noise abatement, and energy economy and insulation, as set by its intended use (essential technical requirements). A building must conform with its purpose and be capable of being repaired, maintained and altered, and, in so far as its use requires, also be suitable for people whose capacity to move or function is limited. In repair work and alteration, the attributes and special features of the building and its suitability for the intended use must be taken into account. Alterations may not endanger the safety of the building's users or weaken their health conditions. In addition, construction must in any case comply with good building practice
- the local authority does not incur any special expenses from road construction or organization of water supply or drainage

- the building is appropriate for the location concerned
- a serviceable access road to the building site exists or can be arranged
- water supply and waste water management can be organized satisfactorily and without causing environmental harm
- the building will not be located or constructed in a way that causes unwarranted harm to neighbours or hinders appropriate building on a neighbouring property
- the local authority does not incur any special expenses from road construction or organization of water supply or drainage
- any restrictions based on the regional plan or the local master plan, as the building restrictions or other restrictions on building and actions¹³⁰, are taken into account (LUBA §§ 33, 43, 116, 117, 135, 136)

In the case of shore areas or areas requiring planning, the local master plan may be used as grounds for a building permit (LUBA §44). However, building activities shall not lead to construction of major significance or cause substantially harmful environmental or other impact (LUBA § 137).

Restrictions to prevent land development

There are also special restrictions to prevent development. The area could be marked as an area requiring planning. Other restrictions include inter alia restrictions on building prohibition.

An area requiring planning

A land area can become an area requiring planning by law or by decision. LUBA distinguished areas requiring planning, as area the use of which involves needs that require special measures, such as roads, water mains or sewer construction or arranging other areas (LUBA § 16.1). Provisions concerning areas requiring planning also apply to construction where the environmental impact is so substantial as to require more comprehensive consideration than the normal permit procedure (LUBA § 16.2). Therefore area requiring planning in this case is based on law. In addition municipalities may set in the local master plan or in the building ordinance that the certain area is an area requiring planning, as section 16.3 of LUBA provides:

“In a legally binding local master plan or building ordinance, local authorities may also designate areas where, due to their location, community development requiring planning may be expected, or where land use planning is warranted by particular environmental values or hazards, as areas requiring planning. An order in a local master plan or a

¹³⁰ The local authority may impose a building prohibition and restrictions on actions in the area for a maximum time of five years during the drafting of the local master plan and for a maximum period of two years during drafting of the local detailed plan. The building restriction may be conditional when the denial of the building permit causes substantial harm to the applicant, and the local authority or, when the area should be considered reserved for its needs, some other public entity does not expropriate the area or does not provide reasonable compensation for the said harm. (LUBA § 33, 38, 53)

building ordinance designating an area as requiring planning may be in force for a maximum of ten years at a time.”

There are also special (additional to the normal procedure) preconditions for granting a building permit in areas where planning is required. A building permit is granted in an area requiring planning that is not covered by a local detailed plan, provided that construction: 1) does not hinder planning or other organization of land use; 2) does not lead to harmful community development; and 3) is appropriate with regard to the landscape and does not hinder preservation of the values of the natural or cultural environment, nor provision to meet recreational needs. Notwithstanding the above provisions an outbuilding may be built in connection with an existing dwelling or farm. When a building permit is considered for an area requiring planning the provisions on deviation procedures shall be observed with regard to hearing interested parties and authorities. The local authority must inform the regional environmental centre of the permit decisions. (LUBA § 137)

These are general rules which give possibilities of interpretation as to what areas can be included within the scope of areas requiring planning.

Building restrictions and prohibitions

There are also building restrictions, which the municipality can impose on land. A building restriction is in force in areas designated by the regional plan as recreation or protection areas or areas for transportation or technical service networks. The area covered by building restrictions may be increased or decreased by a special order in the plan. Where a building restriction is in force, a building permit may not be granted if it hinders implementation of the regional plan. Where a building restriction is in force, a building permit may not be granted if it hinders implementation of the regional plan. The permit shall be granted, however, if its denial on the basis of the regional plan would cause substantial harm to the applicant, and the local authority or, when the area should be considered reserved for its needs, some other public entity does not expropriate the area or does not provide reasonable compensation for the said harm (*conditional building restrictions*). (LUBA § 33)

When the drafting or amendment of a local master plan has been initiated, the local authority may impose a building prohibition in the area and a restriction on action. The maximum term of building prohibitions and restrictions on action is five years. While planning remains incomplete, the local authority may extend the term by a maximum of five years and the regional environmental centre, under application from the local authority and for a specific reason, for a further maximum of five years. (LUBA § 38)

When an area or building requires protection due to its landscape, natural values, the built environment, cultural and historical values or other special environmental values, the necessary regulations for this purpose may be issued in the local master plan (*protection regulations*). These include *restrictions on building and action*. A building permit may not be granted if it hinders implementation of the local master plan. The permit shall be granted if, however, its denial on the basis of the local master plan would cause substantial harm to the applicant, and the local authority or, when the area should be considered reserved for its

needs, some other public entity does not expropriate the area or does not provide reasonable compensation for the said harm (*conditional building restriction*). (LUBA §§ 41, 43)

There are also possibilities which impose the prohibitions during drafting or amendment of the local detailed plan. Section 53 of LUBA provides:

“The local authority may impose a building prohibition in an area concerning for which a local detailed plan is being drafted or amended. Alteration of the landscape in areas where building is prohibited is subject to permit as laid down in section 128 (restriction on action).

A building prohibition is in force for a maximum period of two years. While the plan remains incomplete, the local authority may extend the term by a maximum of two years at a time. However, a building prohibition imposed by the local authority for the purpose of extending the area of the plan may not exceed eight years in duration.

A building prohibition is also in force in areas covered by an approved local master plan or an approved amendment thereof, until the approval decision has taken legal effect.”

In the Real Estate Formation Act (554/1995, hereinafter REFA, e.g. §32) there are further regulations, which aim to prevent activities impeding planning or plan implementation. However, their significance and necessity are often questioned¹³¹ (Viitanen *et al.* 2003, p. 59). These include the provisions which forbid real property formation if the new real properties are not according to the effective plan or complicate further planning. Without formation of real property unit, a building permit cannot in some cases be obtained.

Planning in shore areas

Section 72 of LUBA concerning the need for planning in shore areas states that buildings may not be constructed in shore zones in the shore area of the sea or of a body of water without a local detailed plan or a legally binding local master plan which contains special provisions concerning use of the local master plan or a part thereof as the basis for granting a building permit.

These provisions also apply to shore areas where planning of buildings and other use to arrange for holiday homes which are mainly shore-based is necessary because of anticipated building developments in the area. However, the above provisions do not apply to the following: 1) building required by agriculture and forestry or fishery; 2) building to serve the needs of national defence or frontier control; 3) building required by navigation; 4) building of an outbuilding within the cartilage of an existing residential building, or 5) repair of or limited extension of an existing residential building. (LUBA § 72)

After having heard the regional environmental centre, a local authority may designate areas in the building ordinance where the restriction laid down in paragraph 1 is not in force because no building activity is anticipated in the area due to its location and the area has no special

¹³¹ Only in a detailed plan area with a binding plot division

natural or landscape value or is not needed for recreational use. The maximum term of such a building-ordinance regulation is six years at a time, though not continuing if the condition from which the regulation derives change and the preconditions for the regulation no longer exists. (LUBA § 72)

9. Responsibility for plan implementation

The task to implement the plan is shared between the municipality, the landowners and the State or other public body in areas designated for public areas (Viitanen *et al.* 2003, p. 57).

The role of the local authority

Local authority according to LUBA shall take charge of land use planning and building guidance and control within its territory (LUBA § 20). The local authority is responsible for monitoring the state and development of land use, building and the built environment and the cultural and natural environment as required for planning and building (LUBD §2). In order to do this the local authority must have sufficient resources and expertise available for these functions (LUBA § 20).

In the areas covered by the local detailed plan the municipality is in charge of organising street management, construction and maintenance of water supply and drainage and other public areas (Viitanen *et al.* 2003). LUBA §84.1 defines the street management as: *“the planning, building, maintenance and cleaning and clearing of streets and other measures required to integrate the street area and the service conduits, equipment and structures both above and below it”*. The local authority can also delegate its duties concerning street management completely or in parts to others (LUBA §84.2).

Thus the municipality is responsible for organising the building of the streets, parks, waste water pipes, etc. in the local detailed planned areas, even in the areas owned by private companies or persons. Public areas are implemented either by the municipality, the State or other public bodies. Public space in general, is described as area designated in the local detailed plan as a street area, market place, traffic area, recreational area or some other corresponding area intended for implementation by public body (LUBA §83). In addition the construction of streets may start after the street plan is separately drawn up and approved by the municipality (LUBA §85).

According to law, the responsibility for the implementation of streets or some other public areas may be assigned to the private landowner or titleholder. This concerns the cases when the local detailed plan is mainly prepared for private benefit, to serve as a holiday (recreational) or travel or corresponding project. The responsibility of implementing the public areas may be also delegated to the landowners in cases when the detailed plan benefits only the internal needs of an area. (LUBA §91)

The law provides also that if the municipality does not fulfil the street management duty the regional environmental centre may impose a conditional fine to obligate the local authority to fulfil its duty. This concerns the situations when the street or part therefore is not constructed

so that it is in the condition required by the land use referred to in the legally binding local detailed plan within a reasonable time from when the street management duty begins, and this may be harmful to health or safety or cause some other special harm to the organisation of land use or traffic. (LUBA §179)

Reminder to build

In the local detailed plan area, private landowners are not obligated to build their plots (Viitanen *et al.* 2003, p.61). However, the municipality has the right to issue an owner a reminder to build. Reminder to build may be issued after the local detailed plan has been in force for at least two years. (LUBA §97)

A reminder to build can be issued only if less than half of the gross floor area permitted building rights for the plot has been used or the plot has not been developed in keeping with the plan. After three years, if the landowner has not developed the plot, the municipality is entitled to expropriate the plot without special permission but with full compensation to the landowner (LUBA §97).

The landowner's role

The landowners are in charge of building a 'plot access' at their own cost from the edge of an existing road to their properties (LUBA §88). Landowners pay to the municipality for joining the water supply network and drainage. Water services can be carried out without municipal networks in sparse settlement or shore plan areas (Viitanen *et al.* 2003).

Instruments to support the plan implementation process

Implementation of plans in Finland is also supported by other different instruments described by LUBA. These include for example building easements required by the local development plan, joint arrangements between properties for plan implementation or the location of the community infrastructure. (LUBA §§ 159-164).

The building easements required by the local development plan can be established even if the interested parties do not agree thereon. This easement can be established in order to organize an emergency shelter, parking space or waste management premises for a building or to provide access to the building for another property as well as to use a neighbouring property to provide support for building elements located on the boundary. (LUBA § 159)

If the location of service conduits serving the community cannot be organized satisfactorily in the other places, the private property owner or titleholder is also obligated to allow the location of such services in their property. In this case the agreement concerning compensation shall be made or if not the matter can be resolved according to the Expropriation Act. (LUBA §161)

Sometimes joint arrangements between several properties for plan implementation are necessary. In this case the initiative of one owner of the property and after consultation with other owners or titleholders, the local building supervision authority may stipulate the joint use of the area of a block area or part thereof or of premises forming part of the property. The local building supervision authority prepares an arrangement scheme. Interested parties should reach the agreements concerning the costs of the arrangements. If no agreement is reached, the matter is solved in accordance with the Expropriation Act. (LUBA § 164)

Private landowners also may use some measures for promoting the implementation. For implementation of the local detailed plan the private owner of a part of a plot can expropriate missing parts of the other plot belonging to another private landowner. (Viitanen *et al.* 2003, LUBA §98)

10. Land policy tools

Although the legislation to encourage plan implementation was developing gradually in time and offers nowadays a set of instruments, there is always criticism involved in the discussion concerning plan implementations in Finland (Viitanen *et al.* 2003, p. 59). Below, the description of the most commonly used instruments is presented. In practice the principles or practice to use different instruments varies from one municipality to the other.

Expropriation

Expropriation refers to the transfer of ownership of land to the local authority without the owner's consent. The Finnish Constitution contains the primary rule of the constitutional protection of ownership, where expropriation is an exception from this rule.

Expropriation in Finland is based on parliamentary legislation which is the Act on Expropriation of Immovable Property and Special Rights (1977/603, the Expropriation Act) or is grounded in other parliamentary legislation. Therefore expropriation can be based on the Expropriation Act (*lex generalis*) or on other enactment e.g., LUBA or REFA (*lex specialis*).

Expropriation is rather rarely used. Only approximately less than 1% of land acquired by the municipalities is expropriated (Viitanen *et al.* 2003, p.62). Expropriation is defined not as the primary method for land acquisition. It is stated in the Expropriation Act § 4 that compulsory purchase shall not be enforced if the purpose of the acquisition can as well be achieved in some other way. However, if the municipality wants to acquire land for developing its urban structure, in practise it will always get the permission required for expropriation (Viitanen, 2009)

Expropriation based on the Expropriation Act

The object of expropriation, the content of the "public interest" (public need), the concept of "full compensation" and all procedures, which must be followed, are basically provided by the Expropriation Act.

“Public need” is the general expropriation basis (the Expropriation Act § 4). There is not an exhaustive list on the appropriate purposes for expropriation. Korhonen (1997, p.16) argues that “public interest” generally covers all the needs of society, which allows the society to work in a satisfactory way. Korhonen continues that in the *travaux préparatoires* it is stated that “*the content of the expression “public interest” shall be defined case by case in accordance with the legal practice and the changing conditions, and no general definition can thus be given.*” Therefore the interpretations of the content of the expression of “public interest” can vary depending on the time, the operation and the region and it is not an unchanging legal concept. However, as Korhonen (1997) stated in the jurisprudence this term has been defined rather consistently. Talas (cited in Korhonen, 1997, p.16) argues that public interest can be seen as an opposite to private interest and states that the purpose to be implemented should benefit an undefined circle of people, not only a small special group of people. In addition the same author stated that the purpose to be implemented should be permanent but not necessarily essential. What is interesting in the Finnish case, although expropriation is only allowed for public purpose and the expropriator in most cases is the state or the local authority, also a representative of the private party may be an expropriator, if the existence of a common need that requires expropriation can be proven (see the following part concerning coercive purchase of a missing part of a plot). In addition to “public interest” expropriation is only allowed if there is no other solution to solve the problem or if the harm caused to the private interest is not bigger than the profit to the public need.

The object of expropriation may be either the immovable property or special rights. Immovable property means a title or similar rights to immovable property or to any other land or water area and to the buildings or structures in these areas. Special rights means a right to use (usufruct), an easement, a right of severance or other comparable rights to immovable property or to some other land or water area as well as to buildings and other such construction which are owned by someone else (the Expropriation Act § 2).

The procedure of expropriation according to the Expropriation Act consists of two phases: a phase of obtaining the administrative permit for expropriation and a phase in which the compensation is determined.

The main permit authority in the case of expropriation based on the Expropriation Act is the Ministry of Environment. If the permit is applied for an operation listed in the Act, e.g. for power line, natural gas pipe, etc., and it is not opposed by the parties, the permit decision is made by the District Survey Office. The same applies also if the compulsory purchase is of smaller importance. (the Expropriation Act § 5)

The owner of the property and the holder of a usufruct have a right to be heard before the permit can be granted. They might have given a written statement where they accept the compulsory purchase beforehand, but if not, they have the right to give a statement on the application within a time frame (30 to 60 days) set by the authority. (the Expropriation Act § 8).

If the right to expropriate is directly granted in law (e.g. LUBA) or included in some environmental permit or some confirmed scheme, no separate permit is needed (the Expropriation Act § 5).

Expropriation - lex specialis

For example, LUBA allows expropriation in some cases based on a valid land use plan. Therefore, in these situations, an expropriation permit is not required. Also REFA includes provisions for expropriation.

Section 96.1 of LUBA concerning expropriation rights of local authorities and other public bodies in local detailed plan areas states:

“Within local detailed plan areas, the local authority may, without a specific permit, expropriate such public areas and such plots of public building based on the local detailed plan which the plan designates to a municipal agency or for other needs of the local authority. Correspondingly, the State and a joint municipal board are entitled to expropriate plots of public buildings and public areas based on the local detailed plan which the plan designates to agencies of the State or the joint municipal board or for their other needs.”

In addition Section 98 of LUBA concerning rights to expropriate the building or rights of another party states:

“ The local authority is entitled to expropriate a building or installation belonging to another located on municipal land, or a usufruct, easement or other such right concerning said land belonging to another party under the same conditions and in the same order as it is entitled to expropriate them in connection with the expropriation of land belonging to another.

If a building or installation belonging to another, or usufruct, easement, or other such right prevents the owner of a plot based on the local detailed plan from developing the plot within reasonable time and mainly according to the plan, and the plot has not been so developed, the owner of the plot concerned is entitled to expropriate it in the order prescribed in the Partition Act for the expropriation of part of a plot, provided that expropriation is considered important for implementation of the local detailed plan. The owner of the plot is not, however, entitled to expropriate if the building or installation forming the obstacle was constructed or the corresponding rights arose after the plan being implemented was approved, or if, under the Partition Act, the expropriation right rests with a party other than the owner of the plot according to the local detailed plan.”

In the case of expropriation of land on the basis of an expropriation permit section 99 of LUBA states:

“When the general need so demands, the competent ministry may permit the local authority to expropriate an area needed for community construction and related arrangements, or for other planned development by the municipality.

The competent ministry may grant an authority implementing a plan a permit to expropriate an area included in a regional plan, or to restrict the relevant right of use, if this is required to implement the regional plan in order to meet the common needs of the

State, region or joint municipal board, or the common needs of the municipality's population.

In addition, the competent ministry may grant the local authority a permit to expropriate an area designated in the local master plan as a traffic way, or for housing development or related community construction, and which is required to develop the community according to the local authority's plan, and an area intended for an agency of the local authority or joint municipal board, or for other needs. An area expropriated for housing development or related community construction may also include recreation or conservation areas.”

Section 100 of LUBA concerning expropriation facilitating implementation of a plan provides: *“The competent ministry may grant the local authority a permit to expropriate a building block or other areas included in the local detailed plan, if its expropriation is justified for the purpose of implementing the plan, and the public need so requires.”*

When the local detailed plan or, the local master plan, designates land for a purpose other than private construction and the landowner cannot therefore use the area in a manner generating reasonable return, the local authority or, if the area is intended or designated in the plan for State needs, the State is required to expropriate the area or pay compensation for the harm. (LUBA §101)

The duty of the local authority or the State, to expropriate or pay compensation, takes effect only after the landowner's application for an exemption to the restriction has been denied and the decision has gained legal force (LUBA §102)¹³²

Compensation on expropriation and other land use restrictions

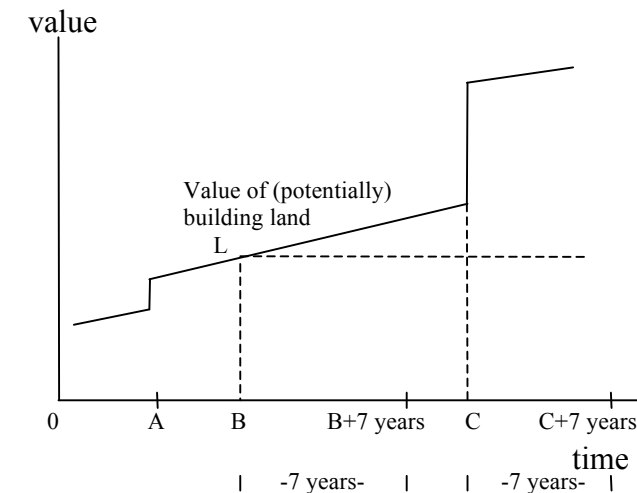
The general rules for compensation assessment are laid down in the Expropriation Act. Section 103 of LUBA concerning expropriation procedure and determining compensation states: *“Unless otherwise provided elsewhere in this Act, the Act on Expropriation of Immovable Property and Special Rights (603/1977), hereinafter the Expropriation Act, shall be observed when an expropriation is implemented under this Act, or when the compensation deriving from a transfer or restriction on land use as referred to in this Act is determined.”*

In general compensation is based on full compensation, i.e. all economic losses the people in direct expropriation relation suffer must be assessed and compensated. In principle the rule is that the landowner's financial situation will remain the same despite the expropriation (Nuuja

¹³² *The local authority and the State are released from their duty to expropriate or pay compensation when, due to an amendment of the local master plan or the local detailed plan, the area can be used for private purposes in a manner generating reasonable return and the matter concerning the duty to expropriate or pay compensation has not been resolved or gained legal force. When resolving a matter concerning the obligation to expropriate or compensate, no changes in ownership or property division that have taken place after the local master plan or the local detailed plan has been approved are taken into account, unless they have been made in order to implement the plan. (LUBA §102)*

& Viitanen 2007). As a rule compensation is monetary, but it is also possible to use the exchange of land or land readjustment (the Expropriation Act § 47).

Full compensation is the fair price (market value) of the object. Traditionally it means a market price calculated from comparable real property transactions (Nuuja & Viitanen 2007). The parties concerned may also agree on compensation.



A= Date of master plan
 B= Date of decision to prepare a local detailed plan
 C= Approval of local detailed plan
 L=Basic level above which the development value can be cut

Figure 20. The cutting of development value. Source: Virtanen 1991, p.36

In Finland compensation must be full, i.e. market value. However, the cutting of the unearned increment is a very important practice. Recapture of unearned increment in expropriation has been applied in theory since 1978. However in practice it has been used only a few times in the last 30 years (Viitanen, 2009). This rule was known as the cutting of development value and it meant that compensation must be determined according to the value, which the land in question had seven years before the beginning of the expropriation procedure. Virtanen (1992, p.35) explained that as following: *“The rise in value which depends upon that plan and happened during those seven years is counted in the municipality’s favour, though the minimum compensation must be the same as the value, which this land had at the moment of the decision to prepare the local detailed plan. If the municipality wishes to obtain the maximum profit from this rule, it must begin the procedure in a period between B (the date of decision to prepare a local detailed plan) and B plus 7 years. If it starts, the expropriation after C (approval of a local detailed plan) plus 7 years, it has lost nearly the entire benefit provided by this statute”*. The Figure 1. explains also that rule.

Section 31 of the Expropriation Act states:

“If the enterprise for which the expropriation is carried out significantly raised or lowered the value of the expropriated property, compensation shall be determined so as to reflect the value that the property would have without said effect.

When immovable property or a permanent special right is acquired by the State, a local authority or a municipal federation for urban development in a area for which the local council has decided to have a local detailed plan drawn up or an existing local detailed plan amended, any rise in the value of the land after the decision to draw up or amend the plan shall be ignored. The party receiving the compensation shall be credited for that part of the rise in value that corresponds to the rise in general price level or that is otherwise caused by reasons other than the planning for the purpose of which the expropriation is carried out.

In determining compensation on the basis of paragraph 2, any rise in the value of the land shall not, however, be ignored for more than seven years, calculated from the day proceeding the date on which the expropriation process was instituted”

Besides the expropriation, there are other types of land restrictions, which limit the scope of the ownership in Finland. These restrictions may be based for example on public planning decisions, e.g. for land use, nature conservation, highways or other public networks¹³³. If these restrictions are considered to be infringing on the constitutional protection of property rights they are also compensated. However, if land use restrictions do not affect the “normal, reasonable and sensible use” of the property and are fulfilling the criteria to be general and non-discriminative i.e. the so-called principle of social obligation they are not compensated. Therefore the right to compensation for land-use restrictions is limited by the principle of social obligation. This principle is illustrated by the so-called compensation threshold, whereby the amount of compensation for land-use restrictions must exceed a minimum threshold for compensation to be paid. This applies to several land-use restrictions. The compensation threshold is based on a certain “tolerance” obligation, where the landowner must tolerate some restrictions without compensation. The compensation threshold also aims to exclude minor disturbances from compensation, and it limits the total amount of compensation for various restrictions. (Nuuja & Viitanen, 2007, p.55)

Land use restrictions are laid down in various planning and environmental statutes. The following can be listed as the most significant:

- The Land Use and Building Act (LUBA, 132/1999): regional, master or local detailed plan, plan regulations, building or other restrictions
- Nature Conservation Act (1096/1996): nature reserve, habitat or species protection
- Act on the Protection of Buildings (60/1985): building protection order
- Highways Act (503/2005): engineering plan to build a highway
- Water Act (264/1961): building in a body of water
- Forests Act (1093/1996): limitations to use of the forest due to forest protection

¹³³ Restrictions may also have their basis in private interests, such as establishing easements or building a private road. However it is not included in the scope of this study.

- Soil Excavation Act (555/1981): denial of soil excavation permit
- Real Estate Formation Act (554/1995): easements and land readjustment proceedings
- Private Road Act (358/1962): rights of way
- Antiquities Act (295/1963): buffer zone for a solid relic
- Railway Act (198/2003)
- Mining Act (295/1963)

In the case of land use restrictions based on LUBA, the Act states that when the local detailed plan or a building or action restrictions in the local master plan designates land for a purpose other than private construction and the landowner cannot therefore use the area in a manner generating reasonable return, the local authority or, if the area is intended or designated in the plan for State needs, the State is required to expropriate the area or pay compensation for the disturbance. This provision does not however apply to areas designated for joint use in a shore detailed plan area, areas where the responsibility for plan implementation has been assigned to the landowner or titleholder, road areas of a public road or street areas. Section 94 of LUBA states that when a local detailed plan is approved for an area for the first time, the local authority gains ownership of any street area not previously in its ownership. These provisions apply however only to land. Losses for buildings or other improvements are compensated (Nuuja & Viitanen 2007).

The landowner has the right to compensation when the restriction's effects are realised. Compensation for land use restriction imposed in LUBA takes only effect after the landowner's application for an exemption to the restrictions has been denied and the decision has gained legal force. It means that although actual land use restriction is imposed on the landowner by the land use plan, the right to compensation is established only when the landowner first applies for an exemption from the restriction and this exemption is denied. It could also happen that the local authority change the land use plan and thus avoid paying compensation. The local authority has also in this case the possibility to expropriate the whole property instead of paying compensation. Therefore the landowner may lose ownership of the property. In practice, land use restrictions based on public planning decisions that treat all landowners alike do not in general establish a right to compensation. Compensation is also not paid where the restriction is considered minor, i.e. it does not exceed the threshold of compensation. (Nuuja & Viitanen 2007)

Section 102 of LUBA concerning restriction on the duty to expropriate or pay compensation states:

“The duty of the local authority or the State to expropriate or pay compensation as laid down in section 101 takes effect only after the landowner's application for an exemption to the restriction has been denied and the decision has gained legal force. The local authority and the State are released from their duty to expropriate or pay compensation when, due to an amendment of the local master plan or the local detailed plan, the area can be used for private purposes in a manner generating reasonable return and the matter concerning the duty to expropriate or pay compensation has not been resolved or gained legal force. When resolving a matter concerning the obligation to expropriate or compensate, no changes in ownership or property division that have taken place after the local master plan or the local detailed plan has been approved are taken into account, unless they have been made in order to implement the plan.”

Section 103 of LUBA concerning expropriation procedure and determining compensation states:

“Unless otherwise provided elsewhere in this Act, the Act on Expropriation of Immovable Property and Special Rights (603/1977), hereinafter the Expropriation Act, shall be observed when an expropriation is implemented under this Act, or when the compensation deriving from a transfer or restriction on land use as referred to in this Act is determined.”

Other cases of compensation on land use restriction include for example, compensation for losses caused by the protection of cultural or historical buildings or nature and landscape protection. These regulations are not handled in details in the scope of this research.

Coercive purchase of a missing part of a plot

Expropriation usually refers to the transfer of ownership of land to the local authority or other public authority without the owner's consent. However, in Finnish expropriation tradition parties other than the public authority also have the right to compulsory purchase. Such procedures are e.g., the coercive purchase of a share in a common area (REFA Section 61) and coercive purchase of a missing part of a plot by a private owner (REFA Section 62). These procedures allow a private party to expropriate. In cases of coercive purchase of a missing part of a plot, the most evident benefit of the procedure is directed to the landowner who is allowed to purchase the missing plot part or parts. However, it must be done in order to promote a public need in the form of the implementation of a land use plan.

Therefore, the right of coercive purchase of a missing part of a plot is a land policy tool, which in certain cases, enables the implementation of the local detailed plan and further land development processes. Issuing building permits is based on the plan and the plot division, if such division has been drafted for the area. In areas with binding plot division¹³⁴, a building permit can be issued only if the plot is registered in the real estate register in accordance with the plot division (i.e. formed as a plot). A prerequisite for the registration is that the whole plot is in the ownership of one owner or by several owners in fractional co-ownership (unity of ownership). In the local detailed plan areas where no binding plot division is required, the prerequisite of unity of ownership or possession has to be fulfilled before a building permit can be issued.

In general, when a plot division is drafted into a local detailed plan area intended for building, the proposed division should take into account the existing boundaries of the real property units (LUBA § 78.4). However, in some cases, following the real property division would lead to an inefficient result and plots consisting of two or more real property units are drafted.

¹³⁴ In the local detailed plan, an area within a building block is divided into plots if necessary to arrange for land use (*plot division*). The plot division may be binding or guiding. When the central location of the area, the building density of the block or the explicitness of the land administration system so require, the plot division shall be made binding. Therefore normally in the city areas, a binding plot division is required. The division is indicated on the map of the local detailed plan. If it not prescribed as binding, it is guiding. (LUBA § 78.1)

In these cases, the plot can be built only if the ownership of the all the parts is in the same hands, as described above.

Coercive purchase of a missing part of a plot is a procedure, which aims to ensure that plots can be developed in cases where the ownership cannot be unified by voluntary means, e. g. a sale or voluntary land exchange, or in cases where the absent owner of the part to be conveyed cannot be contacted or the ownership is unclear.

The coercive purchase of a missing part of a plot has long traditions in the Finnish legal system, the oldest regulations dating back to the fourteenth century. According to REFA Section 62, in order to form a plot or a building site in accordance with the local detailed plan, owner of a part of the plot or building site may make a claim concerning the area of the plot or building site that belongs to others. The general prerequisites for coercive purchase of a missing part of a plot are, that the area concerned is covered by a valid local detailed plan and the applicant owns a part of a plot or building site in that area.

Section 64 of the REFA lays down three additional requirements for the coercive purchase. If the plot can be formed through land exchange, this has priority over the coercive purchase procedure. In this case the land exchange procedure can be executed without the owner's consent, notwithstanding the general requirements laid down in Section 58.2 of the REFA. The coercive purchase must also not cause harm to the clarity of the cadastral system, hinder the formation of other property units in accordance with the local detailed plan nor cause significant harm to any of the parties.

When more than one of the land owners wants to use their right for coercive purchase of a missing part of a plot, priority lies with the party whose share of the plot, including buildings and equipment attached to it, has the greatest value. If the applicants' shares on the plot are equal in value, the priority is given to the party, who first demanded the coercive purchase (REFA Section 62). It should be noted, that in a case of unbuilt land, the designated use of the different plot parts does not affect the valuation, i. e. the plot parts are considered to have equal unit value. In areas with a binding plot division, the municipality may also be entitled or obliged to use the coercive purchase procedure (REFA §§ 62a, 62b).

Right of pre-emption

The municipality has a right of pre-emption in transactions concerning real estate located in their areas (The Pre-emption Act 608/1977, § 1). The right of pre-emption may be exercised to acquire land for urban development and for recreational and conservation purpose (The Pre-emption Act, § 1). It is the right given to the municipality to pre-empt the buyer in a conveyance of a property. In a case where the municipality uses its right of pre-emption the municipality will substitute the buyer (The Pre-emption Act, § 2).

The right of pre-emption does not apply in the following cases:

- The size of the piece of real estate does not exceed 5,000 square metres. In the four cities in the capital area (Helsinki, Espoo, Vantaa and Kauniainen) 3000 square metres.

- The buyer is either the spouse of the seller or a close relative (a person who in accordance with the provision of chapters 2 and 4 of the Inheritance Code (40/65), could inherit the property of the seller, or the spouse of such person)
- The buyer or seller is the State or a State body
- The property is sold by compulsory auction
- When pre-emption cannot be considered reasonable concerning the circumstances (The Pre-emption Act, §§ 5-6)

The municipality must take the decision to use its right of pre-emption within three months of witnessing the deed of assignment (The Pre-emption Act, § 9).

In practice the municipality's right of pre-emption is not widely used (under 5% of the land acquired by the municipalities). Although it is not the main tool to practice land policy it is considered important in negotiations between municipality and private body. (Viitanen *et al.* 2003, p.40)

Lease or sale of land

Land can be disposed of by the municipality in the form of the freehold in land or leasehold. Leasehold of housing sites range from 30 to 100 years. For industrial sites, holiday camps and antenna sites, terms are determined by negotiations. The Leasehold Act (258/1966) does not contain restrictions on the timing of development but it happened in practice that municipalities incorporate special conditions in leases that require lessees to complete construction within a specified period. Land rent and prepayments are determined between the lessor and lessee in negotiations¹³⁵. The land rents are periodically adjusted in order to recapture the land value increments. Adjustment can be based on the living cost index or other indexes, for example there is an index of land prices. Upon the expiry of the contract the lessor will compensate the lessee for improvements made to the land. When the land is dedicated to housing in model contracts developed by the Finnish Association of Local and Regional Authorities (FALRA) the lessee is given the right to renew their contracts¹³⁶. (Virtanen 2003,)

Hong & Bourassa (2003) argue that lease conditions in Finland are not used to control land use. This is controlled by the local detailed plan.

¹³⁵ Leases requiring a lower initial capital investment than buying land and are used in order to promote affordable housing, create employment and capture increased land value. Many families use the advantage of public leasehold. This allows lowering the initial down payment, i.e. lower the initial investment capital needed for a house. (Virtanen 2003)

¹³⁶ Leasehold interest is well protected in Finland. The Leasehold Act secures the free transfer of leasehold rights. The commonly used model contracts for a leasehold are made by FALRA. These model contracts are incorporated into the additional Leasehold Act security of land tenure. This includes: the lessees right to renew their contract (in case of the development of single-family houses and flats). The central objective of leasing public land is to promote urban development and ensure housing affordability. (Virtanen 2003)

Municipalities in Finland are not obligated to organise the public tender process in order to allocate the land. Municipalities' assignment principles for sales of house sites are not regulated by any set of statutorily based norms, in contrast to, for example, the situation when tenants for rented housing built with the aid of state funding under the ARAVA scheme are selected. Every municipality can itself decide about municipalities' assignment principles for sales or lease of house sites within the framework of municipal self-government. By assigning sites a municipality implements its own objectives with respect to housing and economic policies.

Recently, the Parliamentary Deputy-Ombudsman of Finland¹³⁷ has discussed the principles on the basis of which sites for single-family houses were assigned by the municipality in Vantaa, Laukaa and Porvoo. Municipalities' assignment principles for sales of house sites should promote the wellbeing of its own residents and support the authorities in their constitutionally enshrined task of promoting people's opportunities to arrange their own housing. The points system on which sales of house sites, by for example the City of Vantaa, are based on favouring people with higher incomes. The Parliamentary Deputy-Ombudsman considers this system as problematic from the perspective of equal treatment of the City of Vantaa's own residents. The Deputy-Ombudsman issued an opinion, in which a few cases were discussed. In addition it was recommended that the principles underpinning sales of municipal single-family house sites should be decided in advance, and that giving priority to a municipality's own residents is an acceptable principle. The Deputy-Ombudsman has sent a copy of his opinion to the Association of Finnish Local and Regional Authorities for their information and so that they can consider whether there is a need to draft guidelines for municipalities in relation to the matter of municipalities' assignment principles for sales of house sites. (Municipalities' assignment principles for sales of house sites)

11. The key issues in relation to the provision of land

The key issue in Finland, in relation to the provision of land, concerns the problem of the amount of available land for construction. In Finland, one of the lowest populated countries in the world, there is plenty of land but in spite of that there seems to be a shortage of building land. The failure to supply a sufficient amount of land for development impedes the smooth functioning of the real estate market in most cities. Finnish municipalities are criticized for being unable to carry out their land policies, which has led to a shortage of sites and increased land and house prices. The problem of land for development was reflected in the Finnish Government's six measures programme, which aimed to increase the amount of building land available and moderate the prices for building land. As tools for reaching the goal, the following means were suggested: (1) amendments of the taxation of unbuilt building sites in Greater Helsinki, (2) some kind of compulsion for municipalities to draft local plans, (3) a reduction of the possibilities to appeal against a plan and (4) fastening of the appeal process by increasing the monetary resources of the appellate authority, (5) supporting the building of municipal infrastructure in areas where it would lead to an increasing supply of building land

¹³⁷ The Ombudsman has the task of exercising oversight to ensure that authorities and officials observe the law and discharge their duties.

and (6) planning of residential areas on state-owned land. (Government proposition for the State Budget 2006)

APPENDIX B

DELINEATION AND ALLOCATION OF RIGHTS IN LAND DEVELOPMENT PROCESS IN POLAND

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1. Introduction

Poland is a unitary republic with a growing role of self-government. The total area of the country is 312,679 square kilometres. Poland has a population of 38.2 million people. The population density is 124 people per square kilometre. About 61 percent of the population lives in urban settlements. The largest urban agglomerations are located in the central and southern parts of the country. However the western part of the country is the most urbanised, while the eastern part of Poland preserves a more rural character. The country is divided into 16 regions (województwa). These regions are divided into 314 counties (powiaty), 65 cities with powiat status, and 2478 — municipalities (gminy). The municipalities are very diverse in terms of size, social, economic and environmental features, as are both counties and regions in Poland¹³⁸. (Concise Statistical Yearbook of Poland 2007)

Municipality's position in the administration structure

As a result of the transformation process back to a market economy, essential changes in the socio-political system were provided. Constitutional reforms and free elections were agreed upon. For land development process, spatial planning and land management the shift of control over space from central to local authorities was of crucial importance. Radical changes in the system of public administration were confirmed by introduction of the institutions of local self-government. The Act of Self-governing Authority on the Local Level of 8th March 1990 introduced the local self-government institution on the local - gmina level. The rule of local self-government and decentralization of public government has received a rank of major policy rules thanks to the Constitution of the Republic of Poland of 2nd of April 1997. The further decentralization of public administration provided by the Act of Competencies of Public Administration of 24th July 1998 extended the self-governance from the local to a county (powiat) and a regional level (województwo). The new fundamental three-tier administrative division and territorial structure was also confirmed on 1st January 1999 (the Act of Competencies of Public Administration of 24th July 1998). Thus currently the inhabitants of the units of three-step territorial division of the country form self-governing communities. There are autonomous self-governmental authorities at the regional, county and local levels of public administration¹³⁹. The control function of the state is exercised through the regional representatives of the central government called Voivodes¹⁴⁰. (Concise Statistical Yearbook of Poland 2007)

¹³⁸ The basic, traditional self-governmental entities, municipalities (gmina), consist of urban, urban-rural and rural municipalities. The average population of these is 15,000 inhabitants and the average area 125 km². The largest gmina in terms of area is Pisz (635 km²), the smallest is the urban gmina of Górowo Iławeckie (3km²). In terms of population, the largest gmina is Warsaw Central (890.3 thous.) and the smallest is Krynica Morska (1.3 thous.) (Concise Statistical Yearbook of Poland 2007)

¹³⁹ The organs of local self-government entities are: for the municipality (gmina) – Municipal councils and boards, for the county (powiat) – Powiat councils and boards, for cities with powiat status – City councils and boards, for the region – Regional councils (called Sejmik) and the Board of the Region, headed by the Marshal of the Region (Voivodeship). (Concise Statistical Yearbook of Poland 2007)

¹⁴⁰ See also Bandarzewski 2005

The municipality is the basic unit of local government (the Constitution of the Republic of Poland of 1997, article 164.1). Municipal administration and the duties of the municipalities are laid down by the Act of Self-governing Authority on the Local Level of 8th March 1990. Local government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities (the Constitution of the Republic of Poland of 1997, art. 163). The Act of Self-governing Authority on the Local Level of 8th March 1990 identifies two types of tasks that can be performed by the municipality: - their own tasks, which are the tasks aimed at satisfying the collective needs of the community; - assigned task - these are the tasks of government administration, as well as tasks concerning the preparation and organization of the general elections and referendums. Meeting the collective needs of the community is the own task of the municipality (the Act of Self-governing Authority on the Local Level of 8th March 1990, article 7.1). In relation to land management and development the municipal own tasks include in particular: 1) the spatial order, property management, environmental protection and conservation and water management; 2) the municipal roads, streets, bridges, squares and the organization of traffic, 3) the water supply, sanitation, disposal and treatment of urban waste water, the maintenance of cleanliness, waste disposal, the supply of electricity, heat and gas, 4) the local public transport, 5) the protection of health, 6) the social welfare, including the care facilities, 7) the municipal housing (the Act of Self-governing Authority on the Local Level of 8th March 1990, article 7.1).

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According to the Constitution of the Republic of Poland of 1997, article 167, units of local government shall be assured public funds adequate for the performance of the duties assigned to them. However, inadequate equipment of the municipalities in the source of funding necessary to carry out their statutory activities is an important problem. This issue, besides the ideas of decentralization announced by all parliaments, parties and governments, did not receive an appropriate solution till today (Jędraszko, 2005 p.76).

The revenues of municipalities consist of their own revenues as well as general subsidies and specific grants from the State Budget. Own revenues of municipalities consist of:

- Share of taxes allotted to the State budget. The distribution is as follows:
 - 39.34 % of the personal income tax paid by personal income tax-payers whose permanent residency is in the municipality
 - 6.71 % of the corporate income tax from the legal entities and the entities without legal status, who are located in the municipality
- Income from the taxes established and collected based on separate acts of law, i.e. the agricultural tax, the real estate tax¹⁴¹, the transportation tax, income from the tax card, inheritance tax, forest tax, and others
 - Income from the payments established and collected based on separate acts of law, e.g. treasury law, exploitations law, trade law
 - Revenue from the property owned by the municipality, e.g. income from leasing or usufructs

¹⁴¹ In Poland, real estate tax is calculated based on the area of the property (the area based property taxation system). The applicable rates of real estate tax are set by local authorities by way of resolution and may vary the rates applicable within its jurisdiction considering in particular the location and type of business activity (local authorities can lower the rate). The expected introduction of ad valorem tax gives rise to uncertainty as to the future tax burden and affects the investor's decision-making process.

- Other incomes, e.g. administrative municipal fees, local duties, interests on financial resources collected on deposit accounts, interest on payment, which are not paid on time (The Act on Municipal Finance of 2003)

Members of the local self-governing authorities are elected by a universal suffrage for a period of four years. A system of representation of municipalities has been passed to the following authorities: in rural municipalities to municipal administrator, in urban-rural municipalities to mayor, in city municipalities to city president. Municipal administrator, mayor or city president is elected in the general election, in equal, direct, secret ballot (The Act on Direct Election of Municipal Administrator, Mayor and City President of 2002, article 1). In the following chapters in this thesis 'mayor' will be a term used to mean all three authorities: municipal administrator, mayor or city president.

Protection of property rights

The process of restoring property rights and the right to the value of land in fact began under the previous socialist system (Ney & Poczobut-Odlanicki 1998). The Act on Use of Land and the Expropriation of Real Estate of April 29th 1985 led to the following significant changes:

1. *“the institution of reserved resources of State land for the future needs of urban and rural construction*
2. *the basing of land management on economic foundations, with compensation for the expropriation of real estate at last becoming a reality, and with the fee-based utilisation of State land by all subjects introduced along with fees for the use of land in non-compliance with its designation*
3. *the conferment upon developers of the right to the direct purchase of land from natural person at free-market rates*
4. *the possibility for State land in rural areas to be sold to housing cooperatives and natural persons*
5. *the introduction of a new (administration-based) form of utilisation of State land by State organisational units*
6. *the transfer to a national council at voivodeship (regional) level of competencies in relation to local land policy”*. (Ney & Poczobut-Odlanicki 1998, p.204-205)

Post 1989, the processes of compliance with the law safeguarding ownership was confirmed by:

- a provision of the Constitution (1989), which states that: *"The Republic of Poland protects the ownership and the right of inheritance, as well as extending total protection to personal property. Expropriation is only permissible in the public interest and with just compensation"*
- the Act of 7th July 1994 on Spatial Development which confirms the right to the value of land and of material consequences resulting from local development plans. This Act entitles the owners of real estate to full compensation from the State or local authority for any loss in the value of real estate caused by resolutions or changes to local plans. In the opposite case, i.e. where a local plan allows an owner to gain from the increased value of real estate, that owner was, in the event of sale, required to share the profit with the municipality in such a way that the latter receives up to 30% of the increase in value

- The Constitution of the Republic of Poland of 2nd April 1997, which is now in force (Ney & Poczobut-Odlanicki 1998, p. 205)

Article 21 of the Constitution of the Republic of Poland of 2nd April 1997 provides:

- “1. The Republic of Poland shall protect ownership and the right of succession.*
- 2. Expropriation may be allowed solely for public purposes and for just compensation.”*

Article 64 states:

- “1. Everyone shall have the right to ownership, other property rights and the right of succession.*
- 2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.*
- 3. The right of ownership may only be limited by means of a statute and only to extend that it does not violate the substance of such right.”*

Ney & Poczobut-Odlanicki (1998) state that in the area of real estate, the restoration of property rights and of rights to the value of land have been expressed in the following form:

- *“compliance with the law safeguarding ownership*
- *the (true) introduction of the market value of real estate, including land, into the economics of investment undertakings*
- *the introduction of the market value of land and other real estate as the guiding value in the buying and selling of property assets, including in relations between the public-ownership (State or municipal) sectors and the private sector*
- *the development of a property market which, although it varies greatly from region to region, is nevertheless, in the capital city at least, similar to those in Western metropolises*
- *the development of three professions in the area of real estate: assessors, managers, and agents acting in the process of buying, selling or leasing of property”*

Land as a real estate

The Polish law distinguishes three kinds of real estate:

(1) Land – the rule

Real estate is a separated plot within an enclosed boundary on the Earth's surface. It is a separate object of ownership. The right of ownership of a plot extends above the plot as well as below its surface. Buildings, which are permanently attached to land, equipment and other plants, as well as the rights in relation to the ownership of real estate, are the components of the real estate.

2) Buildings

As a rule, a building is a part of real estate (land) but some buildings and other structures attached to a plot of land can be legally separated from the land according to particular regulations. Examples of buildings, which are separate real estates include:

- buildings on land owned by the State or by a local self-governing entity, constructed by a perpetual user or acquired by him as a part of an agreement of perpetual usufruct
- buildings located on land expropriated in Warsaw according to a decree of 26.10.1945

Buildings, as separate real estate, can be distinguished only when the specific legislation defines the legal status of a separate building, in particular, the relationship of the right of ownership of building to the right of the ownership of land, on which the building was erected.

3) Flats

As a rule a flat is a part of a building and part of real estate but in some cases it can be legally separated from the land according to particular regulations. (Havel & Załączna, 2009 b)

The owner of real estate in the most absolute manner but within the limits laid down by legal regulations and regarding the principles of social intercourse, can use the property in accordance with the socio-economic purpose of his right, and in particular may enjoy and receive profits of his property (The Civil Code (CC), art.140). Within the same limits the owner may dispose of his property.

Article 64 of the Constitution of the Republic of Poland of 2nd April 1997 (see above) became the subject of interpretation in practice. Interpretation of this article is of fundamental importance for the spatial management in the country. According to the proponents of the neoliberal approach to market, the property rights in Poland have an absolute character, and should not be subject to any restrictions. This means that real estate owners can freely change the use of real estate in any place and at any time and the tasks of public authority should be limited to approval of construction projects of such changes. The opinions concerning this topic are, however, different in Poland. The law on spatial planning in Poland poses no clarity in this field. (Jędraszko, 2005 p.61)

The other rights to real property can take the following forms:

- perpetual usufruct (użytkowanie wieczyste)
- lease (najem, dzierżawa)
- limited property rights (prawa rzeczowe ograniczone, iura in re aliena): right of use (użytkowanie), easement (służebność), co-operative member's right of ownership, mortgage (hipoteka)
- permanent management (trwały zarząd) – legal form of property holding by a state or municipal organizational unit not equipped with legal personality (Havel & Załączna, 2009 b)

2. The methods of developing building land in Poland

Summary of the methods

There are no statistics on the land development methods in Poland. However, the marginal role of the municipalities in land development was emphasised for example by Kirejczyk & Łaszek 1997, Jędraszko 2005, p.77. Polish municipalities in general do not persuade an active land policy in the sense of acquiring the land, planning and putting in an infrastructure and then disposing ready plots to building developers. Land development follows the model of the so-called single land development (see Dransfeld and Voß, 1993), i.e. the process of land development is usually undertaken on a case-by-case basis. Land remains the property of various old or intermediate owners (developers), and public authorities are responsible for public utilities to be built up.

The results of the investigation of the Supreme Chamber of Control conducted in the years 2006 and 2007 with respect to the 2003-2006¹⁴² period, which were meant to assess the activities of local authorities with respect to the preparation of land for development and with respect to the promptness of issuing decisions concerning public interest projects and land development conditions stated that, municipalities were neither exercising their rights or responsibilities with respect to spatial planning, and the increase in the area covered by local spatial development plans was insufficient relative to the needs. (Havel & Załączna, 2009 a)

For example Jędraszko (2005, p. 77) argues that, operations of municipal local government in the field of spatial development were characterized by passivity. Unlike in the European Union, which normally provides the initiative in land development (by the provision of infrastructure, land consolidation and subdivision, the revitalization of parts of the city, etc.) the Polish municipalities are in this area completely passive. The initiative belongs to private investors who acquire land, where it is the cheapest (or the best from their point of view), and then 'arrange' the conversion of land for building purposes.

There are of course examples of successful land development projects, and a more active attitude toward land development in the municipalities. Maybe 'completely passive' is not the absolutely adequate generalization. Not all municipalities are 'completely passive'. There are 2478 municipalities in Poland, including 889 cities (22 of them with a population between 100.000-199.999, 17 cities have population above 200.000). However, the dominant attitude towards land development in municipalities remains mainly passive (see also the Report of the Polish Ministry of Infrastructure of 2007). There are many private developers operating on the land market, which will be characterised below. The cooperation between the private and the public sectors (PPP) in land development is emerging. Research made for example by (Załączna & Tasan-Kok, 2009) shows that currently in Poland many municipalities and cities with district status are searching for private partners for the implementation of joint projects. However, according to authors, this type of cooperation is rarely officially called PPP due to the provisions of the law in force.

¹⁴² The control took place in 64 municipalities, Source: Informacja o wynikach kontroli kształtowania polityki przestrzennej w gminach jako podstawowego instrumentu rozwoju inwestycji (NIK, 2007, Information about the results of investigation of spatial policy-making in municipalities as a basic instrument of investment development, Warsaw 2007, 8/2007/P06107/KSR.)

Developers operating in the housing market and the forms of construction

Fast economic growth in the second half of the 1990s encouraged many firms to become developers. At first, they could sell everything they built, particularly in Warsaw (in office, retail, warehouse as well as the housing sector). The situation was gradually changing and after 2002 developers had to struggle with vacancy rates. Many of them went bankrupt, initially due to insufficiently prepared investments and then because of insufficient demand. The situation resulted in common mistrust of developers. In the housing sector after the peak in 2003 (a result of legislation amendments) the number of new dwellings stabilized around 100 thousand per year. The most active group has been individuals building for their own use but professional developers have taken an important part of the housing market too. (Mierzejewska & Załączna 2005, Mierzejewska 2005)

There are many kinds of developers operating in the current housing market, including:

- private individuals, building detached housing for their own residential use (but also in order to earn a profit)
- co-operatives erecting premises for co-operative members. In the transition period, co-operative law changed significantly. The old, big, post-communist, bureaucratic co-operatives with tens of thousands of members started to construct and sell dwellings for people outside the queue for flats in a co-operative. Co-operatives started activities as a private developer. Smaller co-operatives also began to appear (according to the law on co-operatives, a group of 10 people can establish a co-operative). There is a tendency to use the co-operative as a substitute investor. Some developers form a co-operative from future owners/tenants before construction begins. After the completion of the investment process, the co-operative is very often closed and ownership rights are transferred. The popularity of the co-operative form compared to the traditional model of development is mainly the result of tax breaks (lower real estate transfer taxes) as well as of the possibility of acquiring the land from the State Treasury or municipalities without the need for the public tender process. (Kirejczyk & Łaszek 1997 p. 61, 106)
- private sector development companies, which come in a variety of forms from co-operatives, through smaller local companies to the major international companies acting as promoters in the commercial sector. Their purpose is to make a direct financial profit from the process of development. This includes also construction companies, and banks and real estate agencies performing development activities and erecting property for sale
- companies erecting premises for their own use
- Social Housing Associations (non-profit property companies which erect housing for rent, first established in 1995)
- municipalities erecting municipal non-profit housing utilities for low-income households (activity of social intervention character), participating in development companies as land provider, or constructing streets, water and sewerage mains, etc.
- churches and religious associations

In addition as a consequence of an underdeveloped financial sector, including restricted access to capital and credit in the domestic sector, in the first period of transition some developers were only able to participate in the developmental process as coordinators, without acquiring land ownership. In this case, the developer acts on behalf of the future owners of the land, negotiating with the present owner the conditions of land allocation. At the same time

the agreement with the developer is signed for the construction of the property (Kirejczyk & Łaszek 1997).

In the housing sector in Poland, the building activity can be analysed based on data collected by the Central Statistical Office over the last 50 years taking into consideration the main participants in the process and the form of construction.

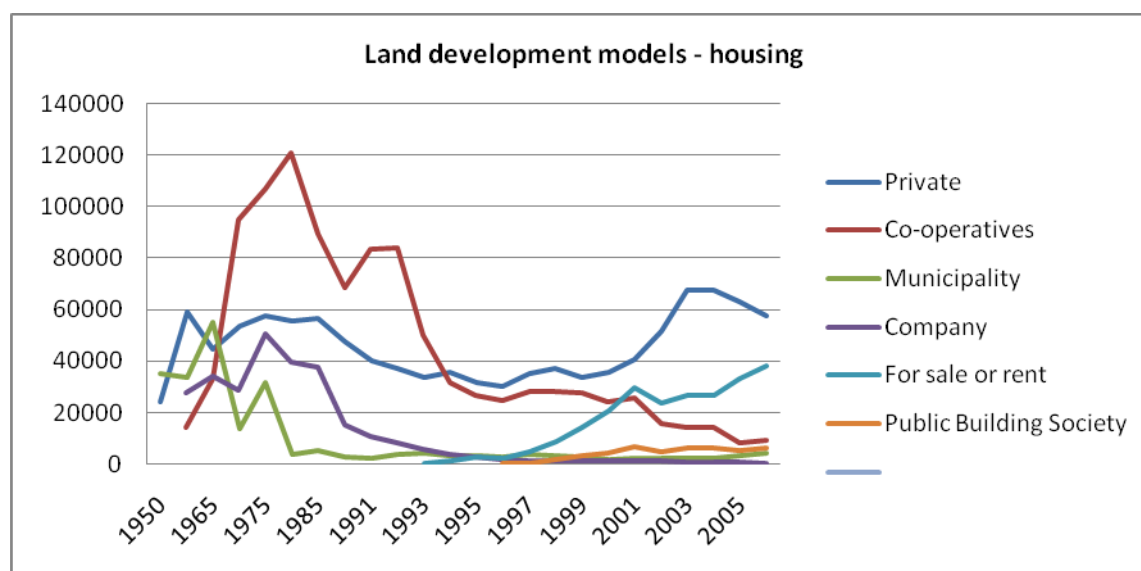


Figure 21. Building activity in the housing sector in Poland. Source: Central Statistic Office in Poland

Figure 1 shows the number of dwellings completed since the 1990's based on data collected by the Central Statistical Office in Poland. In terms of the classification of developments, private construction and co-operative development is self-explanatory. Municipality construction refers to construction with a "social/interventionist" character, usually providing housing for low-income households. Company construction refers to development to meet the residential needs of the employees. The final two categories construction designated for sale or rent and public building societies (Budownictwo Społeczne Czynszowe) are new construction forms, which appeared during the period of transition (see Table 1.)

Table 23. The characteristics of forms of housing construction. Source: Central Statistic Office in Poland

<u>Private construction</u>	This case includes privately financed buildings. The natural persons (also if they are conducting economical activity) realized the development in order to meet the residential needs or in order to earn a profit. This includes the activity of churches and religious associations.
<u>Housing co-operative construction</u>	This is the case when a co-operative is a developer and constructs housing for their members.
<u>Municipality construction</u>	Realized by local authority and financed by them for low-income households. This activity has a social or intervention character.
<u>Company construction</u>	In this case a company from the public or private sector realized the development in order to meet, the residential needs of the employees, reminiscent of the socialist period.
<u>Construction designated for sale or rent</u>	This is the typical case of development realised in order to earn a profit. The investor can be private or public (e.g., development companies)
<u>Public building society (Budownictwo społeczne czynszowe)</u>	This construction activity is performed by the public building association (Towarzystwo Budownictwa Społecznego), operating on a non profit basis, and using credit from the National Housing Fund

From the data indicating the forms of construction it could be noticed that the majority of the market belongs to the private individuals and private developers constructing the housing in order to earn the profit. Therefore, the private sector took the lead in housing construction. Currently the role of co-operatives is marginal, as well as the role of municipal construction, public building construction or companies housing construction.

Private-public partnership in land development

The first projects, which were regarded as the beginnings of PPP (Public-Private Partnership) emerged in Poland in the 1990s. The initial cooperation projects were concerned with the construction or improvement of technical infrastructure facilities, and were mainly small infrastructural investments implemented by local governments. Large projects were mainly concerned with the motorways. The A2 Konin–Nowy Tomysł motorway was built and opened in 1993 by Autostrada Wielkopolska SA. It is an example of public-private co-operation. However, at that time, the institution of public-private partnership did not formally exist within the legal system. This situation created high risk for both public and private partners. In October 2005, the principles of public-private partnership in Poland finally

became defined. The new act of law was introduced together with related executive acts (The Act on Public-Private Partnership of 28 July 2005). However, the law has not been used in practice, so its implementation may not be considered a success¹⁴³. The new law was highly criticized, starting with the definition of public-private partnership or lack of clear definition of public interests, the concept of “prevailing benefit” and particularly its quantitative measurement or the requirement to prepare a profitability analysis, especially in the case of smaller projects. (Załączna & Tasan-Kok, 2009)

There are still different obstacles which hinder the application of PPP in Poland, as Załączna and Tasan-Kok (2009) put it:

“The existing state of infrastructure development and possibility of using EU aid funds should strongly encourage the use of PPP. For many years, quasi-PPP initiatives have taken place, that is, projects that do not fall under public-private partnership according to the current legislature, but from the point of view of their organization and objectives they are of such nature. Local governments are clearly interested in using this option, but a multitude of obstacles limits the implementation of projects in the form of broadly understood PPP. (...) Little knowledge and experience with PPP as well as the unwillingness, or sometimes even opposition, of local communities create additional barriers. Generally, it seems that some barriers occur both on the part of private investors (low profitability, long duration that increases risk, lack of clear interpreting principles) and on the part of public entities (mainly fear of corruption accusations and poor knowledge of PPP).”

Currently, a new act is being developed by the Ministry of Economy, which shows a new direction in the respect to the use of public-private partnership by public and private entities. The new Act abolishes for example the obligation to prepare preliminary analyses, which, as it was pointed out, used to be one of the main reasons of not using the existing legal regulations concerning PPP. Due to legal problems with the application of the PPP formula in Poland, cooperation of public and private entities is not called PPP, although the scheme is quite often similar. There are examples of such cooperation also in cases of land and property development. This concerns usually the creation of shopping, entertainment or sports centres. Examples include: Manufaktura in Łódź 2006 (Apsys undertook the process to revitalize the site and turn the former factory complex into a shopping and entertainment centre) , the Haffner Centre – the New Sopot Centre (development of a new city centre by the Haffner Centre Limited Liability Company owned by City of Sopot – 32.3%, Bank PKO – 49.4%, and developer NDI – 18.3%. The land was a city contribution to the company), the Aqua Park Łódź (the recreational complex, investors include Aquapark Łódź Company, created by the City of Łódź and the Slovenian company Makro 5 Inwestycje – selected in an open tender process, the land was a city contribution to the company). (Załączna & Tasan-Kok, 2009)

In addition, in Poland planning work is entirely a municipal responsibility (as will be also discussed below). According to the provision of law the plan itself can be commissioned

¹⁴³ According to the act, projects that had been implemented before the act came into force or projects underway on the day of enforcement could not be classified as PPP, even if cooperation of public and private entities was stipulated by other regulations. Due to the fact that the preparation of a project under PPP takes a lot of time, such projects have not officially been implemented in Poland yet.

(ordered) and financed by the public authorities. Only in cases of public investment, the investor is financing the plan. The private, commercial developer has neither the right to organize/produce nor to finance plans. However, during my discussions with city officials and developers in Poland I found out that in practice different solutions were developed concerning the participation of the developer in the cost of land-use planning. The city is preparing the city's development strategies and then is looking for a strategic investor. Once a strategic investor is known, the city prepares the local plan. The content of the drawing and the text of the plan are then constructed in a way that takes into account the expectations of both a city and a future investor. Cooperation between municipality and the developer may take also a form of joint venture company. In this case, very often land is the municipal contribution to the joint venture company. This mechanism was used also to avoid the public tender process, which is obligatory in the majority of the cases, as will be explained in more detail below.

An example of the cooperation between local authority and investor (also developer in this case) is the district of Wilanów in Warsaw. The private company Prokom Investment was the investor of the project. The city of Wilanów was a phenomenon on the investment map of Warsaw and a phenomenon because of the method of developing building land. The project was preceded by the urban development competition of 1996. Also the local plan was drafted for the development area. According to the agreement concluded with local authorities in 1999, Prokom Investment has committed itself to invest in the infrastructure in the city of Wilanów around 130 million PLN. In addition, Prokom Investment handed the Environment Fund 30 million PLN, and covered the costs of the wide-ranging preparatory work of the construction of infrastructure (archaeological, geodesic, etc.), which was about 6 million PLN.

3. Development of the new spatial planning system

In the transition period, fundamental for land development was an introduction of new laws concerning the planning system (The Act on Spatial Development of July 1994, which regulates physical planning and land use, further the Act of 1994) and an introduction (a few years later) of new law concerning real estate management, which regulates the management of the state and local authorities real estates, the division, consolidation and subdivision of real estate; pre-emptive purchase rights of real estate; the expropriation and the return of expropriated real estate; the imposition and collection of fees and assessments related to the development of urban infrastructure by public authorities; real estate valuation; and the regulation and licensing of real estate markets and professionals (The Act on Real Estate Management of 21 August 1997, in force from 1 January 1998, further AREM 1997)¹⁴⁴.

Spatial planning system according to the Act on Spatial Development of July 1994

The process of transition created a departure from the centrally planned economy as well as the removal of the centrally controlled planning system. The Act on Spatial Development of 7

¹⁴⁴ This act was later amended, after an introduction of a new territorial division of the country and establishing of the self-governing authorities on the regional and the county levels.

July 1994 abolished the hierarchical spatial planning system and introduced the new planning documents at a local level. This Act replaced previous regulations issued in 1961 and 1984¹⁴⁵.

According to The Act on Spatial Development of July 1994 there were three levels of the planning system: national, regional and local. At the local level two new planning instruments were introduced: the Study of Preconditions and Directions for the Spatial Development of the Municipality (further the Study) and the Local Plan of Spatial Development. At the local level the Act of 1994 also introduced the so-called “the Decision of Building Conditions and Land Development”. Every municipality was obliged according to the Act of 1994 to prepare and approve the Study, which was a comprehensive local planning document. The municipal board draws up these local comprehensive planning documents taking into consideration national and regional goals as well as spatial development policies and programs for a given area. Additionally, the study described among other things, areas within the municipality that should possess the Local Plans of Spatial Development. The Study did not have to be made public and it was not considered a local law. It was often criticized for having rather a superficial methodology and a too general decision content. The Local Plans of Spatial Development were of a binding nature and had the status of local bye-laws for the detailed spatial management of a given territory. This plan also provided a legal basis for reclamation for important public tasks. Depending on local circumstances, this document covered the whole or only part of a municipality. It was intended that the plan will be prepared only for some part of the municipality only when necessary. Therefore, the Local Plans of Spatial Development was obligatory only in some instances, for example, for an area where the implementation of the governmental or regional programs or local public objectives was expected and identified in the Study or specified in special regulations. The preparation of the Local Plan of Spatial Development was included in the municipality’s own tasks and funded by the local government.

In order to give the user of the land or potential developer relevant information on the allowed development, the Decision of Building Conditions and Land Development were introduced. The decision was issued only upon request of the developer for any area in the city. In the case where the Local Plan of Spatial Development existed the Decision of Building Conditions and Land Development was issued based on that plan. In the event of the lack of the Local Plan of Spatial Development, land use and spatial development was defined in the Decision of Building Conditions and Land Development prepared by a licensed planner and issued in accordance with the law following an administrative hearing (trial). Therefore in practice the Decision of Building Conditions and Land Development could substitute the Local Plan of Spatial Development. Obtaining the Decision of Building Conditions and Land Development was an additional obligatory stage before applying for a building permit.

Validity of the old plans

The changes in the planning law of 1994 were intensively debated as unsatisfactory. The legislation procedure of adoption of the new planning law took almost three years in the Parliament and caused uncertainty reducing or slowing down planning activities of many

¹⁴⁵ More on the previous spatial planning system in Poland: Leśniak (1985), Niewiadomski (2002)

local authorities. In addition the changes made by The Act on Spatial Development of July 1994 (which came into effect on 1st January 1995) had not an instantaneous effect on the planning system. The Act of 1994 extended the validity of old plans, which were drafted and adopted in the previous economic period (before the process of transition started). The extension of the validity of former plans provided that the existing old plans took account of the new economic conditions. The majority of developments in the 1990s occurred when existing, former local plans (enacted before 1995) were legally binding. The content of plans was legally binding, however, it was often criticized that a general feature of the existing, former plans was the limitation of its control function (see for example Staniszkis 1995).

On the other hand the further abolition of the old plans involved as much criticism. The plans prepared under the previous acts were valid till 2003, when the new law concerning planning and development were introduced in Poland and abolished the old plans. More precisely, the new act concerning spatial planning, put in effect on 11th July 2003, abolished as of 31 December 2003, all local spatial plans passed under the 1984 law. Therefore it was winding up in one day all of the plans adopted before 1995 in all municipalities throughout the whole country. This was a very important decision because under the 1994 and 2003 Acts, municipalities adopting a new plan were obligated to pay compensation to landowners for decrease in land value due to planning decisions. The areas, which were reserved in old plans for public functions were released and its value unimaginably increased. Those developers, who bought the land before, could pre-empt the increase and just wait for the compensation from the local authority for reassignment of public functions again.

There were extensive discussions concerning the validity of the old plans, and the period of their validity was extended by the Parliament but finally all old plans in all municipalities in Poland expired at the end of December 2003. No mid way compromise was developed, which gave municipalities for example more rights to decide about the abolition of the whole plan or only a part of it. The discussion of the pros and cons of the abolition of plans in Poland can be found for instance in Jędraszko (2005, p.102-112).

The percentage of the area covered by plans varies nowadays in the country. In some municipalities there are no new plans even today. Another municipality prepared the plans according to the new legislations and requirements. The lack of updated spatial plans seriously hindered the control over the land use and development. More statistically significant information about the areas covered by the plans can be found below. Taking into consideration the validity of land-use plans different periods could be distinguished:

- the initial period till 1995 when plans prepared under different economic circumstances was valid (old plans)
- the period between 1995-2003 when municipalities had a possibility to adopt the new plans according to the provision of new planning law of 1994. Some did this but also the so-called old plans were still valid if new plans were not adopted. In the cities where no initiatives were undertaken to elaborate the new plans, the old plans were still the base to issue the planning and building permissions
- the period after 2003 when the old plans finally expired and legally binding became only plans prepared under the law of 1994 (the Act of 1994) or currently in power the law of 2003

Below, the spatial planning system according to current regulation will be analysed.

4. Spatial planning system according to LUPDA 2003

On 27 March 2003, as a result of massive criticism of the 1994 law, the new Land Use Planning and Development Act (further LUPDA 2003) was adopted by the Parliament replacing the Act of 1994. The technical conditions of buildings and any related infrastructure as well as procedures for building permits were governed by the Building Act of 7 July 1994. The new Act (LUPDA 2003) reduced some weak points of the previous Act¹⁴⁶, however it is still commonly viewed as unsatisfactory.

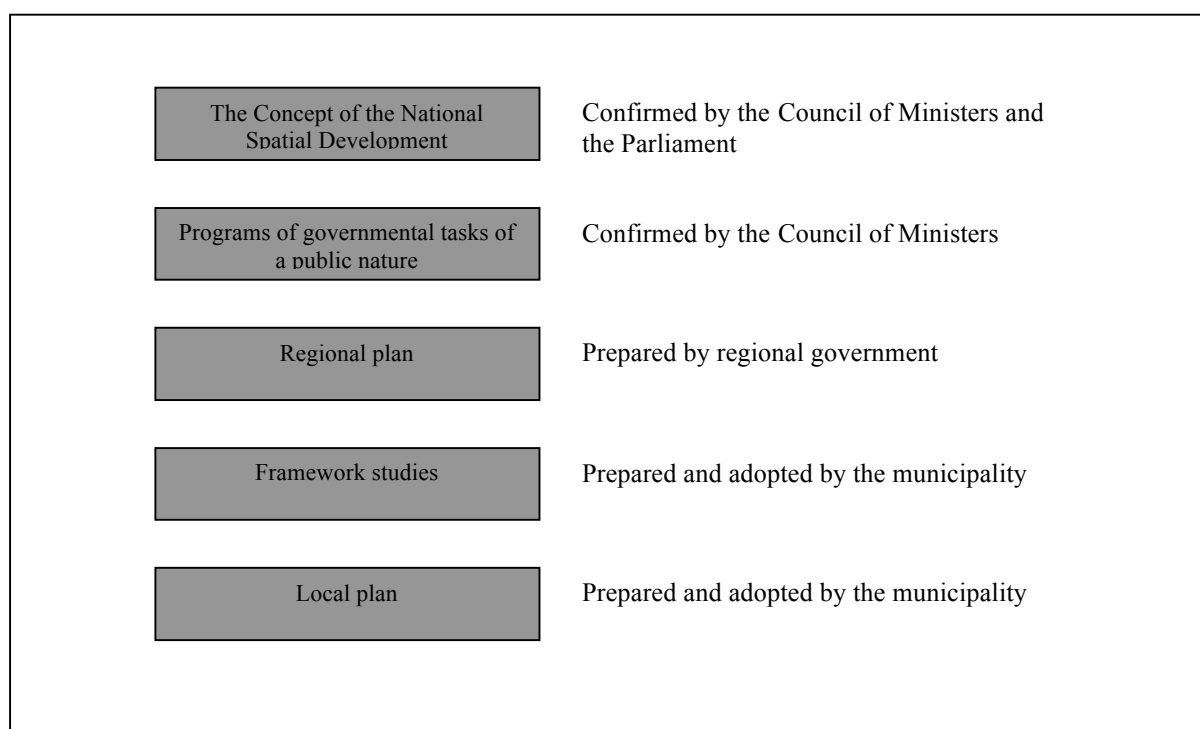


Figure 22. Different levels of land use plans in Poland. Based on LUPDA 2003

¹⁴⁶ According to the authors of the new Act, this Act does not introduce radical changes in the planning system and that it respects the basic tenets of the outline planning law adopted in 1994. The bill introduced the following changes:

- increase the role of the study
- standardise planning documents, introduce greater precision to their function and substance
- simplification of the planning procedures, departure from the former system of appealing twice against local development plans to the Supreme Administrative Court and improving localisation of public investment. From the investors' point of view, the advantageous innovation that the new law introduced is the limited right to lodge complaints against the draft, which allows to shorten the time needed to prepare it. In addition, the Supreme Administrative Court may decide to judge upon an appeal provided that the appellant has submitted a deposit securing the investor's claims, which discourages third parties that might be willing to stop an investment project without a lawful reason. Before that, the draft could be appealed against at two stages of its preparation, now only once. In recent years a serious problem that investors faced has been various organizations orchestrating protests against investment projects; such protests were typically defused after some funds had been paid into the organization's account. (Kochanowski, 2003)

In accordance with the law of 2003, the system of spatial planning functions still at three basic levels: national, regional and local.

National level

According to LUPDA, on the national level the minister competent for regional development, taking into account the objectives incorporated into governmental strategic documents, draws up the Concept of National Spatial Development. This document determines the ramifications, directions and objectives of the country's sustainable development as well as the actions necessary to achieve such development (art. 47.2 LUPDA). The policy sets up, among other things, the basic elements of the settlement distribution network, with separate focus on metropolitan areas (art. 42.2.1 LUPDA). According to LUPDA the minister competent for regional development matters also elaborates on the analysis and programs concerning the areas and problems of strategic value for socio-economic development of the country. Complementary to it, periodical reports on spatial management of the country are to be elaborated on at a national level as part of the state monitoring system. The Council of Ministers adopts the Concept of National Spatial Development and the periodical reports on spatial management of the country and decides to what extent the Concept of National Spatial Development is taken into account while elaborating national programmes for fulfilling governmental tasks of public nature. After an approval by the Council of Ministers, the Prime Minister for acceptance by the Polish Parliament, the Sejm, submits the Concept of the National Spatial Development. The Concept of the National Spatial Development is mostly an information document; however, it partially provides the basis for formulating national programmes for fulfilling governmental tasks of a public nature. National programmes for fulfilling governmental tasks of a public nature are binding on public administration authorities (art. 47.3 LUPDA). Ministers and governmental administration units elaborate on programs on governmental tasks of a public nature. Programs are the subjects of opinion of the Regional Council (called Sejmik). The Council of Ministers finally adopts the programs of governmental tasks of a public nature. Therefore the national policy influences the regional plans through these programs of governmental tasks of a public nature.

At the national level there is also an advisory body to the minister responsible for the built environment, spatial planning and housing - the Main Commission of Architecture and Spatial Planning (art. 8.1 LUPDA). There are also obligatory advisory commissions of architecture and spatial planning at a regional and municipal level (art. 8.3. LUPDA).

Regional level

On the regional level, the regional government is responsible for preparing the regional land use and development plan (the Regional Plan), including the metropolitan area plan (art. 39.1 and 39.6 LUPDA). On the regional level also studies, concepts and programs are also elaborated (art. 38 LUPDA). The planning object is the whole territory under the administration of a single region (art. 39.2 LUPDA). The Regional Plan takes into consideration the Concept of National Spatial Development and the programs of governmental tasks of public nature, as well as the Strategy for Regional Development (art. 39.3-4 LUPDA).

Local level

On the local municipality level two kinds of planning documents are elaborated:

- the Study of Preconditions and Directions for the Spatial Development of the Municipality (further the framework study)
- the Local Plan of Spatial Development (further the local plan)

In addition the law states that if there is no valid local plan for a municipality or its particular part, then defining the manner and conditions of land development takes place through a decision on conditions of site development. Such decisions have been provided for:

- 1) public interest projects – as decisions defining the location of public interest projects (art. 50.1 LUPDA) and
- 2) other (remaining) projects – as decisions on land development conditions (art. 4.2., art. 59.1 LUPDA)

According to LUPDA (art. 2.4) public interest should be understood as generalized aspirations and actions taking into account the needs of the society and local communities related to the spatial development. Under art.2.5 LUDPA, a public interest project is any action of local (municipal) or supra-local (county, provincial or national) authority, which is designated to achieve any of the purposes set out in art.6 of the Real Estate Management Act. Under art.6 of the Real Estate Management Act, the purpose of these actions should be aimed at developing broadly understood public infrastructure, whether technical (water supply, sewage disposal, public roads, but also air traffic, control infrastructure, etc.) or social (schools, community assistance centres, and hospitals, etc.,) and infrastructure that protects against harmful environmental impacts.

Framework study

In order to determine the spatial policy in the municipality, including the need for local land use planning, the municipal council decides to proceed with drafting the framework study (art. 9.1 LUPDA). Framework study set out the preconditions and directions of spatial development for the entire municipal area (art. 9.3 LUPDA). Therefore a framework study should be prepared by every municipality for its whole area.

A framework study defines in particular (art. 10.2 LUPDA): 1) trends in changes of the spatial structure and land development in the municipalities; 2) guidelines and indicators for land use and development, including areas exempt from development; 3) areas and rules for the protection of the environment and its resources, nature conservation, landscape and health resorts protection; 4) areas and the principles of protection of cultural heritage, monuments and contemporary culture heritage; 5) the directions of development of communication systems and technical infrastructure; 6) areas, in which public interest projects on local importance will be located; 7) areas, in which public interest projects on regional importance will be located according to the regional plan and strategies of regional development; 8) areas, for which it is mandatory to draw up a local plan on the basis of separate regulations, including areas requiring consolidation and subdivision of land, as well as areas of location of retail units of over 2000 sqm. and public areas; 9) the areas, for which the municipality

intends to draw up a local plan, including areas that require the conversion of agricultural and forest land for the purpose other than forest and agriculture; 10) directions and principles of the development of areas dedicated to agricultural and forestry production; 11) areas exposed to the danger of floods and landslides of earth masses; 12) places or areas, for which the pillar protection is designated in the deposit of minerals; 13) the areas of monuments of Nazi death camps and their protection zones and existing restrictions on doing business on these areas in accordance with the provisions of the Act of 7 May 1999 on The Protection of Sites of Former Nazi Death Camps; 14) areas requiring transition or rehabilitation; 15) the borders of closed areas and their protection zones; 16) the other problem areas, depending on the circumstances and needs of land development occurring in the municipality.

A framework study binds the municipal authorities in the preparation of local plans (art. 9.4 LUDPA). However, a framework study has no legal obligations for third parties. A framework study is not an act of local law (art. 9.5 LUDPA), but rather an internal regulation of the municipality. In practice, because a framework study is not a legal act it can not constitute the base for issuing the decisions on conditions of site development.

A framework study in summary –

- is the local comprehensive planning document, being a set of general rules and guidelines concerning land use and development
- the planning object is the whole territory under the administration of a single municipality
- the study is not an act of law, but should be taken into consideration while preparing the local plan (art. 9.2-5, art. 12, art. 87.4 LUPDA)
- the cost to draw up a framework study is covered from the budget of the municipality (art. 13.1 LUPDA), however the cost of drawing up or changing the framework study which is resulting from the allocation of public investment of national or regional importance is covered respectively by the state budget, the budget of the region or county budget (art. 13.2 LUPDA)
- a framework study is not a legal act and in practice it can not constitute as the base for issuing the decisions on conditions of site development. The decision can be issued in contradiction to the framework study

Local plan

Local plans are acts of law (art. 14.8 LUPDA) and are prepared to determine land use and development, including land designated for public interest projects (art. 4.1, art.14.1 LUPDA). Local plans, in contrast to framework studies, as a rule do not have restrictions on size of area covered. Local plans can be created for smaller parts of an area, depending on the needs of the municipality. Jędraszko (2005, p. 289) pointed out, however, that LUPDA has changed the meaning of local plan by narrowing its scope to the detailed issue. The local plans are elaborated in general on a scale of 1:1.000 (in certain situations 1:500 or 1.2000, which limit the area covered by the plan). Only for the use of land for forestation or development prohibition, it is permissible to use the maps on a scale of 1:5.000 (art. 16.1 LUPDA).

A local plan as an act of law (art. 14.8 LUPDA) is binding on both public authorities and parties engaged in development processes in the plan area. Article 6.1 of LUPDA states that the local plan shape, together with other law provisions, the way to exercise the right of ownership of real estate. Article 6. 2 of LUPDA states that everyone has the right, within the limits specified by law, to:

- 1) the development of land, to which he/she has a legal title, in accordance with the conditions laid down in the local plan or a decision on land development conditions, if there is a compliance with the protected by law the public interest and the interest of third parties;
- 2) to protect his/her legal interest when the land is developed by other persons or units

Therefore, according to the provision of law development of land, it has to be consistent with the local plan unless such a plan does not exist. Any decision on area development, which does not comply with the plan, is invalid. If the previously issued decisions are not consistent with the new or revised plan, they expire unless construction permission has already been issued. Thus the local spatial plans, if they exist, have a binding character on everybody in Poland.

The Local Plan in summary –

- establishes the land use, localisation of public investment, and spatial development of the municipality and defines together with other acts of laws the way of performing the property rights
- has a binding character for everybody and has a status of a local law for detailed spatial management of a given territory
- the decision to initiate the preparation of local development plans is made by the Municipal Council upon its own initiative or upon a motion of the mayor
- the main tasks of local plans of spatial development are detailed regulations for land use, infrastructure services, delimitation of public spaces, and establishing local standards and building conditions

In Poland the obligation to create a framework study as a basis for showing directions of local development is implemented in a formal sense – an increasing number of municipalities possess such documents. However, as they are only guidelines without legal power, characterised by a high level of vagueness, their function as an indicator for long-term development is not viable. The obligation to prepare framework studies is considered as a ‘necessary evil’, their vagueness leaves a lot of freedom for interpretation and creates favourable conditions for civil servants to interpret them arbitrarily (this is particularly visible when assessing the conformity of a plan with the conditions set in the framework study). There often occur situations that both a framework study and a local plan are made at the same time and the only concern for officials is that regulations pertaining to the framework study should predate regulations pertaining to the plan. This reflects an instrumental approach to framework studies whose real function is not implemented in practice. This also reveals a

broader problem of the responsibility of local authorities for their activities, and this responsibility is in Poland limited to the term of office¹⁴⁷.

The relationship between plans in the spatial planning system

Spatial planning is conducted in Poland at three levels: at the municipality level (the framework study and the local plans), at the regional level (the regional plans and the regional development strategies) and at the national level (the Concept of National Spatial Development and governmental programs of national importance).

In Poland, the system is criticized for the lack of hierarchy or quasi-hierarchy (Jędraszko 2005, p. 249-253, Izdebski *et al.* 2007). Below, first articles from LUPDA are mentioned, which refers to the relationship between plans. Then arguments why the system is not hierarchical are presented.

There are elements of the planning hierarchy which can be found in the legislation, which binds the municipality while preparing the spatial development plans. For example article 9.2 of LUPDA states that the mayor draws up framework studies taking into account the principles set out in the Concept of National Spatial Development, the Strategy for Regional Development and the Regional Plan, and a development strategy of municipality, unless a municipality has such a strategy. Article 11.4 of LUPDA also states that the mayor, following a resolution undertaken by the municipal council to proceed with drawing up a framework study, prepares a draft of the framework study, taking into account the Regional Plan, or in the absence of the Regional Plan or the lack of the incorporation into the Regional Plan the governmental tasks, the mayor should take into account the programs defined in article 48.1 of LUPDA. Article 48.1 of LUPDA states that ministers and central bodies of government within its factual jurisdiction draw up programs, which include the tasks of government for the purpose of a public investment of national importance, hereinafter referred to as "programs of investment of national importance ". Article 44 of LUPDA states that the findings of the Regional Plan should be included into the local plan after arrangements concerning the terms and conditions of incorporation of public investment projects of national, regional and county importance into the local plan are made. The arrangements are carried by the Marshal of the Region with the mayor.

The findings of the framework studies are binding on the municipalities in preparing local plans (art. 9.4 LUPDA). Article 17.4 of LUPDA states, that the mayor prepares a draft of the local plan together with an estimate of the environmental impact, taking into account the provision of the framework study. According to article 20.1 of LUPDA, a local plan is to be adopted by the municipal council after its compliance with the framework study is ascertained. Entry into force of the local plan results in loss of effect of other land use plans relating to the subject area (art. 34.1 LUPDA).

However, it is stressed for example by (Jędraszko, 2005, p.249-253, Izdebski *et al.* 2007) that the above listed documents do not create, through the regulations provided by LUPDA, an integral system. The arguments concern mainly the lack of legally binding

¹⁴⁷ In Finland, the municipal manager (kunnanjohtaja) is a civil servant.

status of the provision of the framework study, a phenomenon called as ‘duality’, the lack of obligation to elaborate the local plans and the complicated system of the approvals mechanism.

The framework studies are not an act of local law (art. 9.5 LUPDA). In the situation when there is no local plan, the framework studies can not constitute the base for issuing the decisions on conditions of site development. There is no legal basis to refuse issuing the decisions on conditions of site development in cases of non-compliance of the proposed activity with the provisions of the framework study. The determination of the decisions on land development conditions is based solely on the law relating to the subject and land covered by the decision.

Jędraszko (2005, p.93-94) highlights, that on the two planning levels: regional and municipal level, there is a strong phenomenon, as he calls ‘duality’. This duality is expressed in the fact that the development strategies and the land use plans / studies are developed by different groups of authors (teams), according to different methodologies at different times. These teams are supervised by different institutions at the regional and local levels, which lead to reconciliation and acceptance of these documents at a different mode. The obvious consequence of this practice is the lack of cohesion (integration) between these planning instruments. The fact of integration of these documents is so rare, that if it happens it is rewarded by the minister. Therefore, Jędraszko alleged lack of integration in the spatial planning system in the sense of interdependence of concepts included in the plans.

In addition Jędraszko highlights the principle of option of elaboration of land-use plans. According to the author LUPDA has introduced a policy of option, except for a specific set of cases. However, if we take a closer look at LUPDA, this is only true in the case of the local plan. With regard to the regional plan and the concept of national spatial development LUPDA states that these documents are drawn up by relevant authorities (art. 38, art. 47.1 LUPDA).

More precisely, article 38 of LUPDA states that self-government authorities at the regional level shall draw up a plan for land use of the province (the regional plan), conduct an analysis and studies, and develop concepts and programs relating to the areas and problems of land use according to the needs and objectives undertaken in this area of work. Article 47.1 of LUPDA states that the Government Centre for Strategic Studies, taking into account the objectives of the government's strategic documents: draw up a concept of spatial land management, which takes into account the principles of sustainable development based on natural, cultural, social and economic conditions. Therefore there is an obligation to draw up plans for the national level and regional levels.

Otherwise for planning documents at a municipal level, where it is not at all an obligation to draw up the local plans. LUPDA provides only about the procedure of plan elaborations (art. 9.1, art. 14.1 LUPDA). The local plan shall be drawn up only if required by separate regulations (art. 14.1 LUPDA). With regard to the framework studies at the end of LUPDA, we can find that municipalities adopt the framework study within a year after the law comes into force.

Jędraszko (2005, p.253-254) highlights that the clearly planned hierarchical systems have been replaced by a quasi-hierarchical system. According to him a quasi-hierarchical system is based partly on the duty to take into account the arrangements of plans at a higher level, and partly on the complicated system of the approvals mechanism.

5. Planning at the local level

Development without plans

The decisions on conditions of site development

In Poland, building permission may be granted either on the basis of the binding local plan or, if such a plan does not exist, then a decision on conditions of site development (art.59.1 LUDPA), and a statement that the land is available for the developer to start the construction is needed. Thus if there is no local plan, the development can take place under certain conditions and a decision on conditions of site development can substitute the local plan. However, the local plan can in a creative way identify orders, prohibitions and restrictions on land use. Decision on conditions of site development can only be based on existing law and analysis of the neighbourhood regulated by law.

There are two different kinds of decisions on conditions of site development:

- 1) a decision defining the location of public interest projects (art.50.1 LUPDA)
- 2) a decision on land development conditions (art.4.2, art.59.1 LUPDA)

The decision on land development conditions may be issued only when all of the following conditions are met:

- at least one adjacent plot, that is accessible from the same public road, must be developed in such a way as to enable requirements to be laid down for the new developments as regards to the continuation of: functions, parameters, features and indicators of development and land use as well as dimensions and architectural form of buildings and facilities, the building (setback) line and the building density (this is so-called good neighbour principle)
- the land must have access to a public road
- the existing or projected land infrastructure must be sufficient for the purposes of the project concerned
- no permission is required for removal of land from agricultural or forestry use, or such permission was issued during the elaboration of local plans that have already expired
- the decision is compliant with other specific regulations (e.g. the Act on Environmental Protection, the Act on Protection of Forests and Agricultural Land, the Act on Historical Monuments Protection) (art.61.1 LUBPA)

Under art. 61.5 LUDPA, the requirements of sufficient existing or projected infrastructure, is deemed to be met if development of such infrastructure is ensured in an agreement between the relevant unit and the investor. The decision on land development conditions is issued by

the municipal administrator, mayor or city president after all required approvals are obtained. (art.60.1 LUBPA)

The issuing of the decision defining the location of public interest projects depends on the importance of the public interest project. In a case of the public interest projects of national and regional importance, the decision is issued by the mayor with cooperation from the Marshal of the Region. In the case of public interest projects of county and local importance the decision is issued by the mayor. (art. 51.1 LUBPA)

The decision defining the location of public interest projects are issued by application by the investor (art.52.1 LUDPA). The decision defining the location of public interest projects binds the authorities in connection with its issuance of a building permit (art.55 LUBPA). A public interest project may be refused to be sited if it complies with other laws. However, it cannot be refused to determine the location of the public investments project, if the investment plan is in accordance with other law provisions (art.56 LUDPA).

In the proceedings related to the issuing of the decision defining the location of public interest projects, the competent authority is undertaking analysis in relation to: terms and conditions of land use and development resulting from the separate regulations, the factual and legal situation of land on which the investment is going to be implemented (art.56 LUDPA).

The application for a decision defining building specifications should include for example information on: the boundaries of the plot, which must be indicated on a copy of the basic map or, if such document is unavailable, a copy of the cadastral map, indicating the referred to plot and the area where the investment is to take place (scale of 1:500 or 1:1000), but 1:2000 for line investments; investment characteristics defining requirements on water, energy and waste disposal/treatment, as well as other needs concerning technical infrastructure and, where necessary, methods of rendering waste harmless, characteristics defining planned ways of developing the land, type of structure and development, including purpose and the dimension of structures (information to be submitted in written and graphic form), type, scale and location of project.

According to §3 of the Regulation on the Determination of Requirements Relating to New Developments and Land Uses in Areas Where No Local Plan Exists of 26 August 2003, before the decision on conditions of site development is issued, the competent authority must designate a survey area around the building lot concerned and conduct a survey of functions and features of developments in terms of the requirements set out in art.61.1-5 LUDPA. The boundaries of such survey areas must be marked on a copy of the base map and must be at a distance of at least 50 meters. Based on the outcome of the survey, the requirements regarding the new development are then set out in the decision on conditions of site development.

Several decisions on land development conditions for a number of applicants can be issued for the same property (art.63.1 LUDPA). Anyone can lodge a motion for issuance of such decision. A copy of each of them should be handed to all the applicants and the owner or user of the real estate. If one of the applicants has been granted a building permission the other decisions are declared to have expired. The decision on land development conditions does not confer rights to the area or prejudice the legal title or rights of the third parties (art.63.1 LUDPA). Therefore decisions on land development conditions do not always translate into

building permissions. As anybody (and not only the landowner) may apply, land development conditions are subject to speculative trade – which happened in particular during the last housing boom. (Havel & Załączna, 2009 a)

In 2005 32.900 applications for a decision defining the location of public interest projects were submitted (data does not include Warsaw, where till the end of 2004 5,8 thousand applications were submitted). There are only about 1 per cent of applications, which were refused. In 2005 185,000 applications for a decision on land development conditions were submitted (data includes Warsaw). In this case there were only about 2,8 per cent of applications, which were refused. Decisions on land development conditions concerning housing construction (84,9 thousand) accounted for slightly more than half of all decisions made. In principle, issuing of the decisions on conditions of site development was carried out without delays. In 2005 the number of applications for the decisions on conditions of site development has increased. (Report of the Polish Ministry of Infrastructure of 2007)

The situation in respect to spatial planning in municipalities is often discussed as unsatisfactory (Report of the Polish Ministry of Infrastructure of 2007). The number of decisions on land development conditions in comparison to the number of building permits shows how often construction investment activities occur in areas not covered by plans – see Figures below.

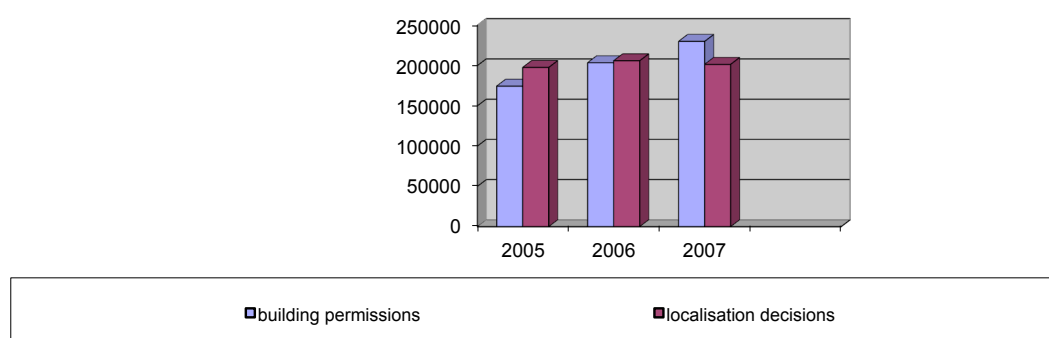


Figure 23. Number of building permissions versus decisions on conditions of site development in Poland in the years 2005-2007. Source: Central Statistical Office

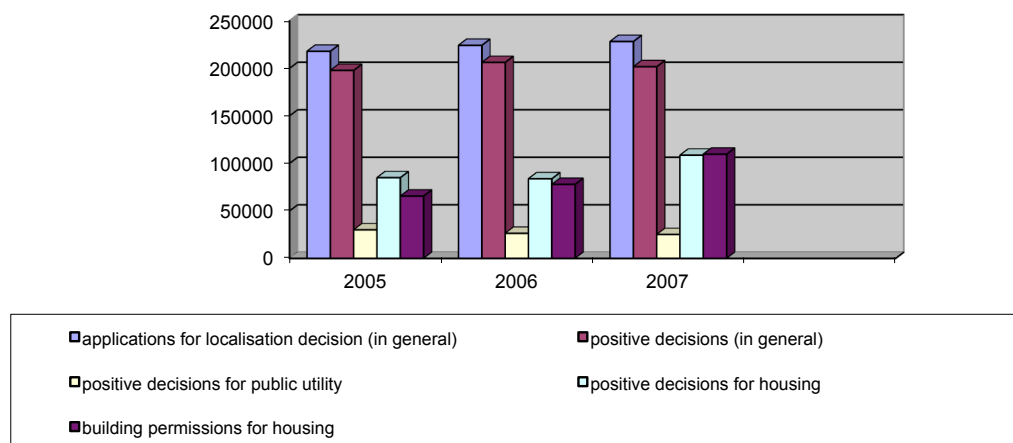


Figure 24. Analysis of building permissions and decisions on conditions of site development in Poland in the years 2005-2007

The charts above bear witness that building in areas with no land-use plan becomes the norm. The system of issuing the decisions on conditions of site development was criticized as pathology by many authors (see, Jędraszko 2005, Izdebski *et al.* 2007). However, developer lobbying is very active in Poland. They still try to convince the public that the system in Poland is an obstacle for their investment plans and it should be even easier to start the investment.

Share of land covered by plans

Despite the improved situation in the planning of the suburban areas, the state of planning is still in most cases unsatisfactory. The results of the investigation of the Supreme Chamber of Control conducted in the years 2006 and 2007 with respect to the 2003-2006¹⁴⁸ period in the 64 municipalities found that the share of land covered by the local plans was 78 700 ha (8.2 %) as of 31 December 2003, and 134 900 ha (14.1 %) as of 30 June 2006. The results of the investigation of the Supreme Chamber of Control implemented in the past year showed that the number of municipalities that had approved the framework studies increased, but, on the other hand, the number of municipalities that possessed local plans did not change much. (Havel & Załączna, 2009 a)

The current state of planning is better in suburban areas than in central parts of the metropolitan areas and urban clusters. This probably stems from the costs of preparing documents, very high in areas highly urbanised and populated, where any proposed changes are faced with protests of the inhabitants, developers and investors. In parts of metropolitan regions, including Warsaw and Krakow there is a very bad situation in the central part of the

¹⁴⁸ The control took place in 64 municipalities, Source: Informacja o wynikach kontroli kształtowania polityki przestrzennej w gminach jako podstawowego instrumentu rozwoju inwestycji (Information about the results of investigation of spatial policy-making in municipalities as a basic instrument of investment development, NIK, Warsaw 2007, 8/2007/P06107/KSR.

city, and a much better situation in the suburban area. (Report of the Polish Ministry of Infrastructure of 2007)

Table 24. The local plans coverage of city areas (November 2006). Source: Union of Polish Metropolities cited in Izdebski *et al.* 2007, p.47

City	% of city area under current plans	% of city area under projected plans	% of city area under current and projected plans
Bialystok	16,2	30,9	47,1
Bydgoszcz	18,0	12,2	30,2
Gdansk	53,7	10,0	63,7
Katowice	11,7	24,4	36,1
Krakow	10,7	18,7	29,4
Lublin	43,8	56,2	100,0
Lodz	15,2	10,5	25,7
Poznan	13,3	30,7	44,0
Rzeszow	6,2	27,1	33,3
Szczecin	16,9	55,0	71,9
Warsaw	15,9	27,6	43,4
Wroclaw	28,8	23,8	52,6
TOTAL	20,9	27,2	48,1

Data from the Union of Polish Metropolitans indicates that the local plan coverage ranged from 6.2% in Rzeszow to 53.7% in Gdansk. It is expected that after adoption of plans under elaboration, the local plan coverage will range between 25.7% (Lodz) and 71.9% (Szczecin).

A situation occurring in the field of spatial planning can create important barriers in development in certain areas. The main reasons for this are: lack of local plans in some units, low degree of coverage of plans in the areas of current and potential business investment, fragmentation of areas covered by the plans, planning chaos resulting from issuing many decisions of conditions of site development, which are undertaken only on the basis of vague conditions and studies. In practice, there are often a lot of very small local plans, which values are basically the same as the decisions on conditions of site development. (Report of the Polish Ministry of Infrastructure of 2007)

Planning process at the local level

After a resolution is undertaken by the municipal council to proceed with drawing up a framework study the mayor should undertake the following steps in the planning process (art. 11 LUPDA):

- To announce in the local press and by notice, and as it is customary in the locality about adoption of a resolution to proceed with drawing up the framework study, specifying the form, place and date for the submission of proposals for a framework study. The

period to submit the proposals should be of not less than 21 days from the date of the announcement;

- To notify in writing, institutions and the authorities, which are competent for agreeing and issuing opinions on a draft of the framework study about adoption of the resolution to proceed with drawing up the framework study;
- To consider the proposals;
- To prepare a draft of framework study;
- To obtain from municipal or other responsible urban planning and architectural commissions the opinions on the draft of a framework study;
- To agree on the draft of a framework study with the Board of the Region in the scope of its compliance with the Regional Plan;
- To agree on the draft of a framework study with the Marshal of the Region in terms of its compliance with the programs of investment of national importance ;
- To call for feedback (opinions) on the solutions adopted in the draft of the framework study from:
 - county administrator
 - neighbouring municipalities
 - competent regional conservator of monuments
 - the competent authorities of the military, border protection and security of the state
 - the director of the competent authority in the field of maritime management concerning development of a technical belt, protection belt as well as sea ports and marinas
 - a competent supervisory authority of mining with regard to the management of the mining areas
 - a competent geological authority
 - a minister responsible for health in terms of land use areas of conservation spas
- To make changes resulting from the opinions obtained and made arrangements (agreements);
- To announce that the draft of the framework study will be available for public inspection at least 14 days before the public display. To display the project of the framework study for public inspection, for a period of at least 30 days and organize at that time, public discussion on the solutions adopted in the draft of the framework study;
- To designate in the notice referred to in paragraph 10 the period, which is not shorter than 21 days from the date of completion of the public display, within which the legal and physical person and organizational units without legal personality can give comments on the draft of the framework study;
- To submit to the municipal council for adoption a draft of the framework study along with a list of not included comments

The framework study is adopted by the municipal council. At the same time the council decides how to consider the comments not included in the framework study. (art. 12.1 LUPDA)

After a resolution is undertaken by the municipal council to proceed with drawing up the local plan, the mayor should undertake the following steps in the planning process (art. 17 LUPDA):

- To announce in the local press and by notice, and as it is customary in the locality about adoption of a resolution to proceed with drawing up the local plan, specifying the form, place and date for the submission of proposals for the local plan. The period to submit the proposals should be of not less than 21 days from the date of the announcement;
- To notify in writing, institutions and the authorities, which are competent for agreeing and issuing opinions on a draft of the local plan about adoption of the resolution to proceed with drawing up the local plan;
- To consider the proposals;
- To prepare a draft of the local plan together with an estimate of the environmental impact, taking into account the provision of the framework study;
- To draw up an estimate of the financial implications of the adoption of the local plan
- To obtain feedback (opinions) on the draft plan from :
 - a. Municipal (or other responsible) Commission of Architecture and Spatial Planning
 - b. municipal administrator or mayor of areas adjacent to the area covered by the plan, concerning the location of the public investment of the local importance;
- To agree on a draft plan with :
 - a. the Marshal of the Region, the Board of the Region, the Board of the County in respect to the governmental and other tasks
 - b. competent regional conservator of monuments
 - c. the competent authorities to agree on a draft plan on the basis of separate regulations
 - d. competent manager of road, if the land use of areas adjacent to the road might affect the traffic
 - e. the competent authorities of the military, border protection and security of the state
 - f. director of the competent authority in the field of maritime management, sea ports and marinas
 - g. competent authority of the mining industry in case of land designated for mining
 - h. the competent geological authority
 - i. minister responsible for development of spa areas
- To obtain permission to change the land use from agricultural and forest to non-agricultural and non-forest purposes
- To make changes resulting from the feedback obtained and make arrangements
- To announce at least 7 days before, in the manner set out in paragraph 1 about public display of the draft plan. To display for a period of at least 21 days the plan to the public together with an estimate of its environmental impact and organize at this time a discussion concerning solutions adopted in the draft plan
- To designate the period (not shorter than 14 days from the date of the end of the pledge of the plan) within which individuals, legal entities and organizational units without legal personality can present comments concerning the draft plan

- To consider the comments, no later than 21 days from the date of expiry of the deadline for its submission
- To make changes to the draft plan due to accepted comments
- To submit to the municipal council the draft plan, together with the list of comments which were not taken into consideration

Therefore during the local plan elaboration procedure, people have a possibility to send the proposal to the plan, participate in negotiations in the form of a public discussion over the accepted solutions in the draft plan and finally to lodge an objection against the provision of a local plan, so-called “comments”. These are the main elements of the public participation according to the provision of the current act. (Havel & Załączna, 2009 a)

The local plan is adopted by the municipal council, after the confirmation of its compliance with the framework study. At the same time, the council decides on how to consider the comments submitted to the draft of the local plan and how to implement them. The council decides also about the methods and finance of the infrastructural projects included in the local plan. (art. 20.1 LUPDA)

The law of 1994, which came into power in 1995, introduced the new mechanisms of public participation in the planning procedure. However, the Act of 1994 does not prescribe public participation in the preparation of regional plans or the obligatory Study at the municipal level. In practice the participative procedure was very often employed in the elaboration of these two plans and has extensive local media coverage, however, it was not required by law (Larsson 2006). The law of 1994 determined that only the local plan is the subject to public participation.

LUPDA 2003 improves the public participation in the elaboration of the plans, extending the scope of public participation to other plans. The situation is nowadays such that the proposal and comments to the draft of e.g. a local plan can be submitted by anybody (art. 18.1 LUPDA). However, refusal to consider them does not create the possibility to appeal to an administrative court. During the preparation of the local plan, a public discussion of its provisions should take place, but its outcome is not binding for the entity that is responsible for the plan (art. 7 LUPDA). It also concerns the comments presented to the framework study, the draft of the framework study or even the regional plan (art. 7 LUPDA).

It is important to notice that a municipal administrator, mayor or city president makes only a general public announcement in the way that is customary in a given place (for example announcement in the local press), that the draft plan is available for public inspection. The act does not specify which group of people will be directly concerned with the provision of the plan and which one will not be. Therefore it may happen that the person whose legal interest may be infringed upon due to the provision of the plan will learn about the case when it is too late and it could happen that the landowner will be unable to influence the already made decisions. It is also important to notice that the owners of the properties and inhabitants of the area included in the local plan are beginning to be involved in the procedure connected with the plan elaboration when the draft plan is put out for public inspection. The information concerning the planning procedure is just publicised at this stage. (Żróbek & Zachaś, 2005)

Izdebski *et al.* (2007, p.12) criticized public participation in the planning process in the following way:

“Community involvement in the spatial planning process in Poland is formal and only protects legal (as opposed to factual) interests of inhabitants and owners, while failing to encourage municipalities to offer alternative development solutions.”

The cost of drawing up a local detailed plan

The cost to draw up a local plan is covered in general from the budget of the municipality (art. 21.1 LUPDA). Only the cost of drawing up or changing the local plan which is resulting from the allocation of public investment of national, regional or county importance is covered respectively by the state budget, the budget of the region or county budget (art. 21.2-3 LUPDA). In the case of a public investment project, the cost to draw up a local plan is covered by investors pursuing the investment, in part, in which it is a direct consequence of the intention to implement this investment (art. 21.4 LUPDA). Therefore private contributions to the costs of plan elaboration are not legal.

6. The scope of interference of the state and other public authorities into a planning process at the local level

The approvals mechanism

The approvals mechanism plays an important role in Polish land use and development system. As seen above according to art.11.6-8 LUDPA and art. 17. 6-8 LUPDA, the mayor responsible for preparing the draft of the framework study or the local plan must seek approval for the draft with a lot of different authorities.

Izdebski *et al.* (2007, p.12) emphasise that the content of the approval mechanism is not precisely defined, as he puts it:

“The law does not specify any principles, values, resources, conditions or requirements that are to be attained or protected; limiting itself to stating rather vaguely that the approvals mechanism should reflect the competencies of the authorities concerned and should appropriately follow the procedure laid down in the Administrative Procedure Code.”

He continues that approvals mechanisms have in fact become a tool, to serve to implement governmental and provincial policies in municipalities. In addition, after the framework study or the local plan is adopted by the municipal council, the mayor has to submit the resolution concerning adoption of the framework study or the local plan to the Marshal of the Region (Voivodeship) in order to assess their compliance with the law. The mayor submits also as attachments, a list of not included comments and all planning documents. (art. 12.2, 20.2 LUPDA)

Izdebski *et al.* (2007, p.12) criticized the Polish system, as they put it:

“Co-ordination in the Polish system is provided by the approvals mechanism (uzgodnienia); whereas, in the English and German systems, this is provided by legislation and planning documents. Planning supervision and review is ex post facto and formal, without going into the merits of the plan.”

The local plans drawn up by the Marshal of the Region

In certain situations the Marshal of the Region (Voivodeship) can draw up and adopt the local plan. It is possible in these situations when: the municipal council has not adopted the framework study, or if the municipal council has not began the procedure of the framework study elaboration, or if the municipal council while adopting the study did not specify the areas of public investment projects of the national and regional importance included in the regional plan or in the programs of investment of national importance. In these cases the Marshal of the Region (Voivodeship), after taking steps to agree to a deadline for incorporating the investments to the framework study, asks the municipal council to adopt the framework study or to amend it within the prescribed time limit. After the expiry of that period, Voivodeship draws up a local plan for an area where municipal council had not fulfilled its duties, to the extent necessary for the implementation of the public investment projects and issues in this case an order of replacement. The local plan adopted in this way has the same legal effect as the local plan adopted by the municipality. (art. 12.3 LUPDA)

7. Consequences of the adoption of the local detailed plan

Compensation for decrease in land value and other restrictions included in the local plan

If, in connection with the enactment of a local plan or its amendment, the use of real estate or parts thereof in the current manner or in line with the intended purpose has become impossible or severely restricted, the owner or perpetual user may require from the municipality:

- compensation for actual injury suffered or
- to purchase real estate or its parts (art. 36.1 LUPDA)

The municipality may also offer other real estate in exchange. When the owner accepts other real estate instead he/she is not entitled anymore to compensation (art. 36.2 LUPDA). If, in connection with the enactment of a local plan or its amendment, the value of the property has deteriorated, and the owner or perpetual user sells the property and had not availed themselves of the rights to compensation before, he/she may claim compensation from the municipality which equals reduction in property values (art. 36.3 LUPDA).

The claims for the compensation may be submitted within five years from the date when the local plans become effective (art. 37.3 LUPDA). The compensation value is established for the day the property is sold (art. 37.1 LUPDA).

Planning charges – a special one-time fee

If, in connection with the enactment of a local plan or its amendment, the value of the property has increased, and the owner or perpetual user sells the property, the mayor gets a one-time fee, as set out in the local plan. This one-time fee is set out in relation to the percentage increase in the value of the property. The fee cannot be higher than a 30% increase in the value of the property. (art. 36.4 LUPDA)

The fee is charged in cases when the owner or perpetual usufructuary sells the real estate within 5 years from the date when the local plan or its revision came into force (art. 37.4 LUPDA). The mayor may collect this fee (art. 36.4 LUPDA).

Transfer to the municipalities the area needed for streets

After the local plan is adopted the real estates must be divided according to the new plan in order to start the construction process. According to the Act on Real Estate Management of 21 August 1997 (AREM), after approval by the municipality of the division of the real estates, the landowner must transfer to the local authority's ownership those parcels that have been separated for streets, and in return should receive compensation in cash or in the form of land (art. 131, art. 98 AREM). The problem is that most municipalities do not have funds to pay the compensation.

Article 98.1 of AREM states that plots of land designated as public roads (municipal, county, regional, or national) – within the real estate divided at the request of the owner, must be transferred, by law, accordingly to the ownership of the municipality, county, region or the State Treasury on the date on which the decision approving the division has become final. Article 98.3 of AREM states that for plots of land referred to above, the landowner should receive compensation in the amount as agreed between the owner and the competent authority. If there is no agreement, at the request of the owner the compensation shall be determined and paid according to the rules and procedures applicable as in the case of expropriation of real estate.

8. Restrictions to prevent development

Suspending the issuing of the decision on land development conditions

The proceedings regarding the determining of the decision on land development conditions may be suspended for up to 12 months from the date the application for determining the development conditions was filed. The municipal administrator, mayor or city president will re-open the proceedings and issue the decision on land development conditions if: 1. the municipal council has not adopted a resolution on starting to draft a local plan within two months of the proceedings being suspended, or 2. during the suspension period, no local plan nor any amendment thereto was adopted. (Art.62.1 LUDPA)

Area for which a local plan must be drawn up

The framework study defines in particular areas, for which it is mandatory to draw up a local plan on the basis of separate regulations, including areas requiring consolidation and subdivision of land, as well as areas of location of retail units of over 2000 sqm. and public areas (art.10.2 LUDPA). The obligation to draw up a local plan in the cases formed after a period of 3 months from the date of the establishment of this obligation (art.10.2.3 LUDPA).

If the application for a decision on land development conditions concern an area, for which there is an obligation to draw up a local plan, the proceedings regarding the determination of the decision on land development conditions is suspended until the local plan is adopted (art.62.2 LUDPA).

9. Development control

The scope of development control

In Poland, building permission may be granted on the basis of the binding local plan or, if such a plan does not exist, a decision will be made on conditions of site development (art.59.1 LUDPA). The local plan or the relevant development decision binds the county authority in connection with its issuance of a building permit. Under art. 4 of LUDPA everyone has the right to development of land, if he/she proves the right to use the property for construction purposes (prawo do dysponowania nieruchomością na cele budowlane) and the intended construction is consistent with the law. The right to use the property for construction purposes means the title of the ownership right; the perpetual use right, the management right, the limited property rights, or other relationships providing the power to carry out the construction works (art. 3 of the Building Act). Art. 3 of the Building Act defines building activities as the construction of the building (together with the installations and technical equipment) and other structures permanently attached to the ground, as well as the small object architecture in a particular place, including also reconstruction, extension and superstructure of it.

The procedure for obtaining building permission

A motion for a building permit should be submitted by a person interested in the construction supervisory authorities. The building permit application should be accompanied also by the following: the building design (architectural and building design and plot/area development design prepared by an authorised person) together with all technical agreements and permits required in the detailed regulations, proof of the right to use the property for construction purposes, the decision on conditions of site development if necessary according to LUPDA, and other permissions required by other regulations if applicable.

The construction permission expires if construction has not commenced within 3 years of the date when the building permission decision has become final or if the construction is temporarily suspended for a period longer than 3 years (art. 37.1 the Building Act). On the basis of a final, non-appealable decision comprising of a building permit issued by the

construction supervisory authorities, the developer or landowner may undertake construction works.

In addition there are a special requirements concerning agricultural land provided by the Agricultural and Forest Land Protection Act of 3 February 1995. The undertaking of construction projects on land classified as agricultural or a forest, requires a decision to exclude such land from agricultural or forest production. Both owners and perpetual usufructuaries of land classified as agricultural land who intend to remove such land from agricultural or forest use are obligated to pay fees for such removal in accordance with the provision of the Agricultural and Forest Land Protection Act of 3 February 1995.

In consideration of amendments to the Environment Protection Act of 28 July 2005 and other Acts of Parliament effected on 18 May 2005 it is necessary to indicate whether the investment carries with it potential significant impact on the environment. If so, the potential investor could be required to draw up an environmental impact report before being permitted to proceed further. Investments regarded as having a significant impact on the environment might require the issue of decisions stipulating environment-related specifications prior to any approval being announced. Decisions are issued by the Department of Municipal Real Estate Management and Environmental Protection. Matters concerning the above are regulated by art. 46 and the above referred to Act of Parliament.

10. Responsibility for plan implementation

The role of the municipality

Under the Act of Self-governing Authority on the Local Level of 8th March 1990, article 7.1 the municipal own tasks include in particular: 1) the spatial order, property management, environmental protection and conservation and water management; 2) the municipal roads, streets, bridges, squares and the organization of traffic, 3) the water supply, sanitation, disposal and treatment of urban waste water, the maintenance of cleanliness and order, waste disposal and municipal waste, the supply of electricity and heat and gas, 4) the local public transport, 5) the protection of health, 6) social welfare, including the facilities and care facilities, 7) municipal housing. Therefore municipalities in Poland by law are responsible for technical infrastructure (roads, waterworks, public transport, etc.) and should attend to construction of public spaces and communal water and sewerage. However, they are often very passive in fulfilling their tasks. In practice, developers are faced with the need to implement the infrastructure from its own resources, which finally affect the prices of realized objects. Izdebski *et al.* 2007, p.12 pointed out that:

“Most municipalities, instead of quoting land infrastructure costs and adopting plans with funds committed for the development of the planned infrastructure, only determine land infrastructure solutions and the related financing sources. In effect, land is not ready in technical terms for plan-compliant projects.”

The landowner's role

Landowners are in charge of building a plot. Another problem is the monopoly position of suppliers of gas, electricity, telecommunications, or the recipient plan. In connection with the passive attitude of most municipalities, arising mostly from the shortfall in the budgets, the developers are forced to make a free donation of realized on their own cost the infrastructure elements, such as transformer stations or cable networks.

11. Land policy tools

Betterment charges

Landowners in Poland participate in the costs of construction of technical infrastructure facilities by paying betterment charges to the municipality (AREM art. 144). This principle is adopted for real estate disregarding its type and location, as long as the construction of technical infrastructure facilities is co-financed by the Treasury, local self-government entities, European Union funds or non-returnable foreign funds, excluding lands designated in the local plan for farm and forestry use (AREM art. 143).

The construction of technical infrastructure is understood as the building of roads and underground transport, on ground or above ground pipes or infrastructural equipment for water, sewage, heating, electrical, gas and telecommunications (AREM art. 143.2).

The mayor may, by decision, establish betterment charges after creation of conditions for the connection of property to individual devices of the technical infrastructure or conditions for the use of built roads. The decision concerning betterment charges may be issued in the period of 3 years from the date of creating the conditions for connecting the property to technical infrastructure (AREM art. 145).

Betterment charges depend on the increase in land value caused by the construction of technical infrastructure facilities (a real estate appraisal is required) (AREM art. 146). The value of betterment charges shall not be higher than 50 percent of the value of the difference between the value of the land before and after the technical infrastructure facilities are built. The rate of the infrastructure development compensation is set by the municipality council through a resolution, but the value of the compensation in particular cases is determined by the municipal executive body. (AREM art. 146)

Betterment charges may be, at the request of the owner of the property, spread over annual instalments payable over a period of 10 years. Conditions spread across the instalment shall be determined in the decision concerning the betterment charges. (AREM art. 147)

Betterment charges may also be implemented in the event of an increase in property values due to its division and in the event of an increase in property values as a result of the consolidation and subdivision. (AREM art. 98a)

If, as a result of the division of property, made at the request of the owner or perpetual user, the value of the property increases, the mayor may establish betterment charges by decision. The amount of percentage of betterment charges is set up by resolution of a municipal council. The value of betterment charges shall not be higher than 30 percent of the value of the difference between the value of the land before and after the division. The decision concerning betterment charges may be issued in the period of 3 years from the date of when the decision concerning division of property becomes final. (AREM art. 98a)

Persons, who have received the new property as a result of consolidation and subdivision process, are required to pay to the municipality betterment charges in the amount of up to 50% of the increase in the value of these properties, in relation to the value property owned before. The amount of the percentage is determined by the decision of the municipal council. (AREM, art.107)

In Poland, even though municipalities have insufficient finances, they make little use of the instruments that were created especially for improving this situation. In 2002, the Supreme Chamber of Control carried out a control to evaluate the process of determining and collecting betterment charges in the years 1999-2002 (up to the end of the third quarter of 2002)¹⁴⁹. The control revealed that municipalities were reluctant to levy and collect betterment charges, also in cases where they financed costly technical infrastructure facilities. The controlled municipalities completed a total of 1 256 investments related to technical infrastructure facilities for a total of PLN 483 997 000, with their own resources amounting to PLN 412 039 000 (85.1%)¹⁵⁰. (NIK 2003)

Control results revealed that in 16 municipalities under scrutiny (50%) municipality councils did not pass any resolutions required by law concerning levying betterment charges. Real estate appraisal was not done, either, which practically made it impossible to determine whether betterment charges procedures should in fact be started or not. There were also problems with the collection of the compensation fees that some of the municipalities did levy. (NIK 2003)

According to the Supreme Chamber of Control, due to the irregularities and negligence in the collection of levied betterment charges and abstaining from levying betterment charges (despite the fact that the value of real estate had increased), the revenues of the controlled municipalities had been diminished by at least PLN 2 905 300 (of which 329 000 was recovered as a result of the SCC's post-control motions). (NIK 2003)

According to the SCC's data for the years 1999-2002, in 252 municipalities out of 276 under consideration, significant changes were made to local spatial development plans. However, only 60 municipalities (approx. 24%) collected a one-off betterment charge fee from perpetual usufructuaries for an increase in the prices of their property due to the municipality's planning activities. Results from the control carried out in 2007 largely

¹⁴⁹ A control was carried out in 32 territorial self-government units.

¹⁵⁰ The remaining capital used to finance these investments came from appropriated funds and loans amounting to PLN 51 374 (10.6%) as well as voluntary contributions from the owners or perpetual usufructuaries of real estate located within the range of an investment amounting to PLN 20 374 (4.3%).

confirm the results of previous controls in this respect¹⁵¹. Municipalities still did not make substantial use of their statutory rights to levy betterment charges fees or execute their duty to collect planning compensations. As a result, they deprived themselves of their budgetary revenues, which were evaluated at over PLN 3.6 million. (NIK 2007)

It happens also in practice that developers pay two times. First the developer participates voluntarily in the part of the cost of construction of technical infrastructure in order to facilitate the process and then the developer pays again the betterment charges. It could also happen in practice that the developer is building the technical infrastructure and the municipality releases him from betterment charges.

Tender process

In Poland, by law, The State Treasury and local authorities in general can offer land (also other real estates) for sale via a public tender process, the principles of which are laid down in the Regulation of the Council of Ministers of 13 February 1998 and Chapter 4 of AREM. These regulations set out detailed rules and procedures for the disposal of real estate owned by the State Treasury or the municipalities. Departures from mandatory public tender procedures are allowed only in cases strictly enumerated in statutory law.

Under art.13 of AREM real estate owned by The State Treasury and local authorities can be traded. In particular, real estate may be subject to sale, exchange, the perpetual usufruct, lease, permanent management, and limited property rights. Real estate owned by The State Treasury and local authorities can be used as contributions in kind to companies and state-owned companies as well as foundations. The perpetual usufruct right may also be the subject of contribution to the created company. Real estate owned by The State Treasury and local authorities can also be donations for public purposes, and also the subject of donations made between the State Treasury and the body of local self-government, as well as donations made between local self-government bodies. Under art. 28 and art. 37 of AREM sales of real estate or disposing land in the form perpetual usufruct is possible in two ways via a public tender process or without the public tender process.

Real estate owned by The State Treasury and local authorities can be transferred (sold or transferred in the form of the perpetual usufruct) without a public tender process, in the following situations (art.37 of AREM):

- the real estate is transferred to a person entitled to priority in the acquisition
- disposal takes place between the State Treasury and the body of local self-government, and between local self-government
- the real estate is transferred to the individuals and legal entities which are engaged in charitable activities, care, cultural, therapeutic, educational, scientific, educational, sports activities, for purposes unrelated to profitable activity
- disposal concerning the exchange or donations
- sale of the real estate is to its perpetual user

¹⁵¹ 32 municipalities were investigated.

- disposal concerns the real estate, or part thereof, which may improve the management of the adjacent real estate, which is owned by a person who intends to acquire the real estate or part of it, and if it cannot be developed as separate real estate;
- real estate is given as a non-monetary contribution to the new created state or local government legal person, or created foundation
- the real estate is transferred to the management of a special economic zone, in which the real estate is located
- disposal concerns the part of the real estate, to the other joint owners of real estate;
- disposal concerns churches and religious organizations, which have regulated relations with the country
- the real estate is sold to the private partner or a company referred to in art. 19.1 of the Public-Private Partnership Act of 28 July 2005, as an own contribution of a public body, to carry out the public investment projects through public-private partnership, with restriction to art.25 of the Public-Private Partnership Act of 28 July 2005. Under art.25 of the Public-Private Partnership Act of 28 July 2005 after the completion of the contract partner or private company forward back asset under the implementation to the public body or state or government legal entity established on the basis of separate laws.
- the real estate is transferred to delegations or diplomatic consular offices of foreign states

In addition the Marshal of the region in relation to real estate owned by the State, or the relevant council for the real estate owned by the local government units, by ordinance or resolution, may exempt from the obligation to dispose the real estate via the public tender process if:

- real estate is designated for housing, technical infrastructure or other public purposes, if these targets will be implemented by the entities for which they are statutory objectives and whose income issued for statutory activities
- the sale of real estate is to the person who rents the real estate on the basis of an agreement for at least 10 years and the real estate has not been built on the basis of an authorization for the construction. Provision does not apply in cases where the acquisition of real estate seeks more than an entity that meets the above conditions (art.37 of AREM)

Therefore real estate may be for instance released from the obligation of organizing the tender if for example the potential usufructuary is an entity whose statutory aim is to develop residential real estate and all its income is used for this purpose. In other cases the tender process is necessary of both transfers: the sale of ownership rights and perpetual usufruct rights (art. 37.1 AREM). The municipality is required to inform the public as to the properties available for sale or let, and to the date and terms of bids (art.38 of AREM). The municipality provides detailed information about the property, including for example:

- a description of the property and its designated use under the local development plan
- the development required and the dates of commencement and completion of construction
- the form of sale
- the sale or rental price

When offering land for sale or use, a municipality is obliged to specify its designated use as set out in a local development plan. This gives investors certainty that a proposed project can be carried out on the selected site. The starting price cannot be lower than the valuation of the property as made by a certified valuation expert. The law provides a departure from this rule (with a maximum reduction of 50%) only in the case of sale structures listed in the register of historical monuments. In order to participate in the public bidding process, the investor must pay a deposit within a time limit specified by the organiser. The outcome of the bidding process is the basis for entering into a notarial deed of sale for the property or for a contract to grant the right of a perpetual usufruct to the land.

Expropriation

The basic principles of real estate expropriation are laid down in the Constitution of the Republic of Poland, while the detailed procedures laid down in The Act on Real Estate Management of 21 August 1997, in force from January 1st 1998 (AREM). Therefore expropriation is regulated separately from planning and building law. Real estate expropriation means deprivation of the property rights or other rights to a real estate (perpetual usufruct, limited property rights) by an administrative decision, for just compensation.

Under art. 112 AREM expropriation procedures can be applied only to the real estate which is located, (with exceptions provided under art. 125 and art. 126 AREM), in the areas covered by the local plans which are designated in the plan for public purposes, or for which the decision defining the localisation of public investment project has been issued. The exceptions from this general rule have been provided for:

- activities related to searching for, identifying and excavating minerals which are the property of the State (up to 12 months);
- temporarily taking over the real estate in the case of an emergency situation, when considerable damage needs to be prevented (up to 6 months).

Expropriation of real estate can be used, if public interests cannot be achieved in any other way than by deprivation or restriction of property rights, and these rights cannot be acquired by agreement. Real estate may be expropriated only for the State Treasury or to the self-government units (art. 113 AREM).

The expropriating public body must first negotiate with the real estate owner, and propose an agreement (art. 114 AREM). Therefore expropriation has to be preceded by negotiations between a public entity and the owner of the real estate which is indispensable for achieving a specific public purpose. If the real estate, which is necessary for a public purpose, cannot be acquired by purchase, the expropriation procedure is instituted.

The following stages of the real estate expropriation procedure have been identified by Żróbek & Żróbek (2008, p.66):

- *“establishing the necessity to achieve a public purpose on a real estate;*

- *conducting negotiations with a view to acquiring a real estate by means of concluding a contract within 2 months);*
- *issuing an expropriation decision – instituting the expropriation proceedings – administrative trial;*
- *establishing the compensation – decision to be taken by the head of the county;*
- *appeal, if any, against the decision to grant compensation and its amount;*
- *taking the final decision and payment of the compensation”*

Expropriation decisions are issued by the head of a county, within the scope of performing government administration tasks, and appeals are considered by the Marshal of the Region. The transfer of a substantial right to the State Treasury or to units of territorial self-government becomes effective on the day the expropriation decision becomes final (art. 118a AREM).

Compensation in expropriation

The decision concerning expropriation (including the amount of compensation) is issued by the head of the county. The expropriation law is accompanied by provisions for the payment of prompt and adequate compensation. Article 126 of AREM provides for example that an expropriation of rights to real estate is accompanied with compensation to the expropriated person corresponding to the value of those rights.

Payment of compensation for expropriated real estate in Poland is guaranteed by the Constitution of the Republic of Poland. Article 21 of this Constitution states that expropriation is allowed solely for public purposes and for just compensation. Just (equitable) compensation means compensation corresponding to the market value of the property.

The term ‘full compensation’ is not applied in the Polish Constitution. Instead the adjective ‘just’ is used. It means in practice the compensation mechanism refers to the fair market value of the property. There is only compensation for value of taken land. There is no compensation in relation to damages associated with expropriation, such as loss of future profits. (Gdesz, 2007)

Therefore, compensation shall be based on the market value of real estate affected in the day of the decision of expropriation (art. 134 AREM). Where the market value cannot be ascertained, the compensation may be determined using the cost approach. As compensation the real estate owner may accept also other real estate offered by the expropriating public body. The compensation must correspond to the current use of real estate or the use designated in the local spatial development plan, if this use, consistent with the purpose of expropriation, will result in increase of the value of the real estate. The acquiring authority can receive the land when the decision concerning expropriation is final. It means that in case the landowner appeals the decision to the higher instance, land cannot be transferred. This situation results in the postponing of many public projects.

Compensation is deposited sometimes at the court. It concerns the following situations:

- a) the entitled person refuses to accept it,
- b) the payment of compensation meets obstacles which are difficult to overcome,

- c) compensation is paid for a real estate with unregulated legal status (art. 133 AREM)

The amount of the compensation is established by certified real estate appraisers (art. 130.2 AREM). Detailed principles of real estate appraisal are provided in executive regulations to the law – The Directive of the Cabinet dated 21 September 2004 regarding real estate valuation and preparing the appraisal study. As compensation, the owner or perpetual user may receive, subject to the approval, the relevant replacement property. (art. 131 AREM)

In determining the market value of the real estate in particular it should be taken into account: the nature, location, method of use, intended use, the degree of equipment in the technical infrastructure and the current state of real estate prices in the real estate market. The value of the real estate is determined according to its current use, if in accordance with the purpose of expropriation, the value does not increase. If the purpose of expropriation causes increase in the value of real estate, the market value of the property is determined according to an alternative use arising from the purpose of expropriation. (art. 134 AREM)

Right of pre-emption

Under art. 109 AREM the municipality has a pre-emptive in the event of sale of:

- 1) unimproved land prior bought from the State Treasury or the self-governing authority
- 2) the usufruct right of unimproved land regardless of the form of acquisition of that right by the vendor
- 3) real estate and the usufruct right to the real estate located in the area reserved in the local plan for public purposes or real estate, for which the decision defining the location of public interest projects was issued
- 4) real estate and the usufruct right to the real estate registered in the Cultural Heritage Register

There are several exceptions from the rules; e.g. a municipality does not have the pre-emption right in cases of sale for people who are relatives of the seller. More precisely, under art. 109.3 AREM the municipality does not have the pre-emption right in the following cases:

- 1) selling of real estate or the perpetual usufruct right to the people close to the seller;
- 2) selling of real estate or the perpetual usufruct right between the legal persons of the same church or religious association;
- 3) rights of ownership or perpetual usufruct was established as compensation for loss of property;
- 4) rights of ownership or perpetual usufruct was established as a result of the conversion of real estate property
- 5) in the cases referred to in paragraph. 1, 3 and 4, when the right of first refusal has been not registered in the land book (real estate register)
- 6) sale of the property is for purposes of construction of national roads

Using lease conditions to control land use and development

In the agreement concerning a perpetual usufruct, the manner and time limit for the development of real estate, including the date of its construction can be defined (AREM, art.29, art.62). If the deadline for the development of the real estate was not observed, the competent authorities may set a new deadline for the development or establish the additional annual fee, or ask for the termination of a contract of a perpetual usufruct (AREM, art.63)¹⁵².

A perpetual usufruct is a special entitlement to land popular in Poland. The nature of this right is similar as in the case of ownership right although it is established for a limited period of time. Perpetual usufruct is a right established only on land owned by the State or self-governing institutions and it represents a long-term interest in land. The State Treasury or local authority remains the landowner while perpetual usufructors (the holder of perpetual use) may use the land as owners with limitations only in time and as specified under the perpetual usufruct agreement. This right can be established on land in urban areas and settlements (within the territories of cities), and/or in areas designated for future development (outside cities but covered by local development plans). It is concluded by an act or a contract between the State Treasury or a local authority and a natural person or legal entity in the form of a notarial deed. The agreement describes the use of land, the period of agreement (a minimum period of 40 and a maximum period of 99 years, but usually for 99 years, with an option to extend the term for an additional period of up to 99 years), investment conditions and development work, the usage of buildings and structures, and commission arrangements for the perpetual user for building and structures existing on the land at the date of expiry of the agreement. Thus this agreement determines the date and the manner of land development. The further extensions of the contract are also possible. If the perpetual usufructor uses the property in a manner inconsistent with the use designated in the contract, in particular if he has not developed the land within the time limit specified in the contract, the perpetual usufruct can expire before the term fixed in the contract. The conclusion of a contract concerning perpetual usufruct is the subject of an obligatory public tender organised by the owner, the State or by a self-governing institution. (CC art.234-236, AREM, Chapter 3)

For land developers it is important that in the case of perpetual usufructs buildings (or other structures) erected on the land under perpetual usufruct, remain the property of the perpetual user. The perpetual usufruct is available only in cases of land; the property inherently tied to such land (buildings, structures, and machinery existing on the land before an agreement) cannot be a subject of perpetual usufruct and has to be sold (subject of the right of ownership) (AREM art. 3).

All buildings and structures constructed or acquired are the properties of the perpetual user and are considered as separate real estate (CC 235 §). This is something special because as a general rule in Poland the buildings erected on the owner's land become the property of the owner of the land. Perpetual usufruct right is an exception to this general rule in Poland. Article 253 §2 of the Civil Code (CC) states that the ownership of buildings and structures on land belonging to a perpetual user is connected with the right of a perpetual usufruct. This means that the ownership of buildings shares the legal fate of a perpetual usufruct – the sale

¹⁵² See also Dale-Johnson & Brzeski (2003)

of perpetual usufructs is equivalent to the sale of a building, while at the same time the disposal of a building is not possible without the disposal of the equivalent perpetual usufruct right. Transfer of the right of a perpetual usufruct should take place at the same time as the transfer of ownership of any buildings and structures constructed on the land (AREM art.31). Upon the expiration of a perpetual usufruct the perpetual user is entitled to compensation amounts in the value of the erected buildings (and other constructions) as at the day of expiration. Compensation is paid unless the buildings have been erected in the breach of the agreement on establishing the perpetual usufruct.

Usually land is given for perpetual use for the period of 99 years. After winning a tender, the buyer is obligated to make the first payment, i.e. 25% of the bid value, than starting from the next year after signing a notarial act, the buyer is obligated to make annual payment for the municipality.

12. Criticism of the system

There is a lot of criticism involved in the functioning of the spatial planning system in Poland. The system is criticized for instance for causing increased chaos in cities and inadequate provision of infrastructure. *“There is widespread belief in Poland that the spatial planning system is not working well. The way the problem is most often seen in the media is that there is insufficient growth in new residential development when compared with social needs; instead of facilitating the appropriation of new land for residential purposes, the spatial planning system hinders housing development”* Izdebski *et al.* (2007, p.7). This is justification for undertaking the study concerning functioning of the spatial planning system.

Izdebski *et al.* (2007) ascertained to which extent the making and applying of spatial planning law at local level in Poland meets democratic rule of law standard. First democratic rules were defined by the authors. Democratic rule of law in the field of spatial planning, according to the authors, concern five following fundamental standards¹⁵³:

- (1) (...) *Only existing developments are protected: New developments are in principal subject to public authority approval*
- (2) *Planning jurisdiction, meaning the authority to determine the urban structure of a location and to manage the local building process, is vested in the lowest level of local government*
- (3) *There is a strict relationship between spatial development opportunities (intensification of land use) and the condition of the infrastructure. Ensuring the availability of land infrastructure is a public duty, which, however, may be placed on the private investor. Public infrastructure must be developed before an occupancy permit is issued*
- (4) *The spatial planning discretion of the municipality/district is not absolute: it serves to strike a balance between public and private interest, it is limited by real community involvement in the planning process, and is subject to administrative and judicial review*

¹⁵³ The standards were determined based on analysis of English and German planning systems.

- (5) *Spatial development monitoring is in essence a detailed determination of the requirements for land development, but derogations from the development requirements under the plan are legally permissible*

The Polish system was criticized by the authors as they argue that the system suffers from numerous weaknesses in relation to these fundamental rules. According to Izdebski *et al.* (2007) the fundamental reason for an undoubtedly bad situation is an incorrectly formulated regulatory framework.